

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 414

MICHAEL SHENKER, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1962

CERTIORARI GRANTED NOVEMBER 19, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 414

MICHAEL SHENKER, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit		
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania	A	1
Relevant docket entries	1	1
Second amended complaint	4	4
Answer of defendant, The Baltimore and Ohio Railroad Company to second amended com- plaint	11	9
Transcript of trial (excerpts)	14	11
Reading of stipulations between parties and, agreement	14	11
Reading of answers to interrogatories	16	13
Testimony of Michael Shenker—		
direct	20	16
cross	37	23
Examination by the Court	53	29
Testimony of Michael Shenker—		
direct	54	30

	Original	Print
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania—Continued		
Transcript of trial (excerpts)—Continued		
Colloquy between court and counsel	55	31
Testimony of Richard H. Moffatt—		
direct	60	34
cross	64	37
redirect	67	39
H. L. Banks—		
direct	68	40
cross	74	45
Donald Runyon—		
direct	76	46
cross	79	49
Examination by the Court	80	49
Motion for directed verdict, etc. (B & O)	80	50
Motion for directed verdict, etc. (P & L E)	80	50
Colloquy between court and counsel	81	51
Ruling on motion for directed verdict, etc.	87	55
Colloquy between court and counsel	88	56
Reading of stipulation to be substituted for a previous one	96	61
Ruling on motion for directed verdict, etc.	97	62
Testimony of Edward William Beck—		
direct	98	62
cross	101	64
redirect	102	65
Richard H. Moffatt—		
(recalled)—		
direct	102	65
cross	104	67
redirect	108	70
H. L. Banks—		
(recalled)—		
direct	109	71
Ruling on motion for directed verdict, etc.	112	71
Motion by the Baltimore and Ohio Railroad Company for directed verdict	120	77
Motion by the Baltimore and Ohio Railroad Company for judgment N.O.V.	121	77

INDEX

iii

	Original	Print
Appellant's appendix consisting of portions of the record from the United States District Court for the Western District of Pennsylvania—Continued		
Opinion and order, Marsh, J.	122	78
Order denying Baltimore and Ohio Railroad Company's motion for judgment-N.O.V.	125	81
Final judgment	126	81
Opinion, Goodrich, J.	127	82
Dissenting opinion, Kalodner, J.	130	84
Judgment	135	89
Order denying petition for rehearing	137	90
Clerk's certificate (omitted in printing)	138	90
Order extending time to file petition for writ of certiorari	139	91
Order allowing certiorari	140	91

[fol. A]

[File endorsement omitted]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 13755

MICHAEL SHENKER, Plaintiff,

vs.

**THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE
PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, Defendants.**

Appeal of The Baltimore and Ohio Railroad Company.

Appellant's Appendix—Filed October 2, 1961

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 16438

MICHAEL SHENKER, Plaintiff,

vs.

**THE BALTIMORE AND OHIO RAILROAD COMPANY and THE
PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, Defendants.**

RELEVANT DOCKET ENTRIES

1957

Nov. 21, Complaint filed with demand for jury trial thereon.

**Dec. 7, Defendant's answer filed with acceptance of service
thereon.**

1959

Jan. 12, Order entered joining Pgh. & Lake Erie as party defendant and directing that amended complaint be filed. (Willson, J.)

Jan. 12, Amended Complaint filed.

[fol. 2] Feb. 2, Answer of defendant Baltimore & Ohio Railroad to amended complaint, filed.

Feb. 2, Answer of defendant Pgh. & Lake Erie Railroad to amended complaint, filed.

Oct. 12, Motion for leave to amend complaint filed by plaintiff.

Oct. 12, Proposed amended complaint filed by plaintiff.

1960

Jan. 20, Answer of defendant Baltimore & Ohio Railroad to second amended complaint.

Jan. 30, Answer of defendant Pgh. & Lake Erie Railroad to second amended complaint.

1961

Apr. 13, Trial opens before Marsh, J. and jury.

Apr. 17, Trial continues.

Apr. 18, Trial continues.

Apr. 18, Motion by Baltimore & Ohio Railroad for directing verdict, denied orally by the Court.

Apr. 18, Motion by Pgh. & Lake Erie Railroad for directed verdict, granted orally by the Court.

Apr. 19, Trial continues and concludes. Trial memo filed.

Apr. 19, Verdict filed. The jurors find a jury verdict in favor of the plaintiff Michael Shenker in the amount of forty thousand dollars (\$40,000.00).

Apr. 19, Order entered at close of all the evidence, upon due consideration of motion of defendant Pgh. & Lake Erie Railroad for directed verdict, it is ordered that said motion be and the same hereby is granted and

[fol. 3] judgment be and the same hereby is entered in favor of the defendant Pgh. & Lake Erie Railroad. (Marsh, J.)

Apr. 19, Pursuant to granting of directed verdict for Pgh. & Lake Erie Railroad judgment is hereby entered in favor of defendant Pgh. & Lake Erie Railroad. James H. Wallace, Jr., Clerk.

Apr. 20, Order entered pursuant to the verdict of the jury empaneled in the above-entitled action directing the Clerk to enter judgment in favor of the plaintiff Michael Shenker and against Baltimore & Ohio Railroad Company, defendant, in the sum of Forty Thousand Dollars together with costs. (Marsh, J.)

Apr. 20, Pursuant to verdict and order, judgment is hereby entered in favor of Michael Shenker, plaintiff, and against Baltimore & Ohio Railroad Company, defendant, in the sum of Forty Thousand Dollars together with costs. (Judgment entered 4/20/61) James H. Wallace, Jr., Clerk.

Apr. 22, Motion for judgment n.o.v. filed by defendant Baltimore & Ohio Railroad.

May 15, Transcript of jury trial held in Pittsburgh, Pa., commencing on Apr. 13, 1961 before the Honorable Rabe F. Marsh, D. J., filed.

June 26, Hearing before Marsh, J. on motion for judgment n.o.v. (Marsh, J.)

June 26, Hearing concluded C.A.V. Trial memo filed.

Aug. 8, Opinion filed and order entered denying defendant Baltimore & Ohio Railroad's motion for judgment n.o.v.

Aug. 21, Notice of appeal filed by defendants.

4
[fol. 4]

IN UNITED STATES DISTRICT COURT

SECOND AMENDED COMPLAINT

(Trial by Jury Demanded)

1. Plaintiff, Michael Shenker, for his cause of action says that the Defendant, The Baltimore and Ohio Railroad Company, is and was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and engaged as a common carrier of freight and passenger transportation for hire, and as such owns, operates and controls various lines of steam and electric railway in the Commonwealth of Pennsylvania and various other States of the Union, and that in connection with its business as a common carrier it maintains, controls and operates freight and passenger stations for the loading and unloading of its freight and passengers, and in particular, it maintains a station in the City of New Castle, Pennsylvania, wherein passengers board and disembark from its trains and mail is loaded and unloaded from mail cars while the train is in the station.

2. Plaintiff says that the Pittsburgh and Lake Erie Railroad Company is and was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the State of Ohio and that as such was engaged as a common carrier of passenger and freight transportation for hire, and as such owns, operates, and controls lines of railway in the Commonwealth of Pennsylvania and various States of the Union, and that in the course and conduct of its business, it takes on and [fol. 5] discharges freight and passengers at the Baltimore and Ohio Railroad Station located at New Castle, Pennsylvania.

3. That at all times herein mentioned the Defendant, The Baltimore and Ohio Railroad Company, permitted and allowed the Defendant, The Pittsburgh and Lake Erie Rail-

road Company, to use its tracks, station, employees and facilities for the taking on and discharge of freight and passengers under an arrangement and agreement between said parties, the terms of which are well-known to the Defendants, but are not known to the Plaintiff herein.

4. That at the time of the accident and injury herein complained of, the Plaintiff was a baggage man employed by the Defendant, The Baltimore and Ohio Railroad Company, at its New Castle station and at all times herein mentioned he was engaged in interstate commerce, and he directly, closely and substantially affected such commerce; and that by reason thereof, Plaintiff and the Defendants were engaged in interstate commerce and transportation; that the Plaintiff's action herein arises under the Federal Employers' Liability Act, 45 U.S.C.A., Sections 1-59, with Amendments thereto.

5. Plaintiff says that on or about the 15th day of October, 1956, he was employed by the Defendant, The Baltimore and Ohio Railroad Company, as a baggage man, his duties, among others, being to assist in loading and unloading freight on baggage and mail cars at the Defendant's, Baltimore and Ohio Railroad Company, passenger station.

That at about 12:25 o'clock in the morning of said day, while he was engaged in loading baggage consisting of mail and other packages from a truck or wagon into a baggage car in a passenger train, being operated by the [fol. 6] defendant, Pittsburgh and Lake Erie Railroad Company, and headed west to Youngstown, Ohio, through a narrow aperture or opening of the door on the south side of said car, which caused him in loading said bags from the truck to the mail car to turn and twist in an unusual and extraordinary manner while throwing said bags and packages through the opening, and as he was in the act of performing said duties suddenly, unexpectedly and solely by reason of the negligence of the Defendant, as hereinafter specifically set forth, one of the bags caught upon said car causing him to lose his balance, twist and turn, violently and forcibly, and sustain injuries in the following respects:

He sustained a contusion, twisting, wrenching and displacement of the muscles, nerves, ligaments and vertebrae of the spine and back, particularly in the lumbar and lumbo-sacral regions, with nerve root pressure and irritation, and that by reason of said injuries he sustained a concussion of the spinal column and cord and that by reason of said injuries his back has become tender, stiff and sore with a considerable loss of the function and use of said back, from all of which he suffers pain, tenderness and soreness.

Furthermore, by reason of said injuries he was required to undergo an operation upon his back and spine for the removal of a ruptured or herniated disk at the level of the fourth lumbar vertebrae, and that ever since the surgical removal of said lumbar disk his back has been exceedingly sore and tender, with excruciating pain in the region of his lower back and into his legs, and that by reason of said injury and operation there is a considerable loss of elasticity and limitation of motion throughout his entire back and lower limbs.

[fol. 7] He sustained a severe twisting, wrenching, bruising and contusion of the sacroiliac, buttocks and hips, and of the lower abdomen, so as to strain and wrench the nerves, muscles, blood vessels, skin and flesh of the stomach and stomach wall, and that by reason of said injuries the function of said parts and organs have become greatly weakened and impaired.

6. Plaintiff says that by reason of all of said injuries and accident, he sustained a severe and lasting shock to his general and central nervous systems, and from his experience, through the accident and injuries, his general health has become greatly weakened and impaired; and that he has been sick, sore, and greatly disabled ever since sustaining said injuries and will continue to be such for the rest of his life.

7. Plaintiff says that at the time of the grievances herein complained of and for some time prior thereto the door of said car was in a dangerous, defective and unsafe condition in that the door in said car would not open a sufficient width to permit the free and accessible loading of

said mail bags and freight; that said door and its operating parts were old, weak, worn, broken, and out of repair so as to cause it to stick and jam and not flow freely upon its runners, ball bearings or other appurtenances, and that the Defendants knew of said dangerous, defective and unsafe condition of said door and the failure of said door to properly and fully open, but, nevertheless, the Defendants directed and instructed the Plaintiff to load the freight and mail bags speedily onto the baggage car, so as not to delay trains, over and above the protestations of said Plaintiff and his request for additional help; that the Defendants failed to make any inspections or proper inspections of the conditions then and there existing and failed to warn or [fol. 8] apprise Plaintiff in loading the bags in the manner as hereinbefore stated that he would injure himself or liable so to do while in the performance of his work. That the Defendant, Pittsburgh and Lake Erie Railroad, negligently stacked and piled bags, packages and freight against said car door so as to hinder the easy and free opening of said door, so that when Defendants, Pittsburgh and Lake Erie Railroad Company's, employee, attempted to open said door wider, it failed to move and that Plaintiff was required to load the baggage through said narrow opening of the door.

8. Plaintiff states that for some period of time after reporting to the Defendant, Baltimore and Ohio Railroad Company, the accident and injury to his back, defendant negligently requested and caused him to report to work and perform his labor; that Defendant failed and neglected to provide him with any aid or assistance, manual or otherwise, while so physically conditioned and disabled, that Defendant negligently caused and permitted him, while so disabled and injured, to lift barrels of bricks, baggage, bundles of newspapers, and otherwise such as to cause him to place a constant stress and strain upon his back so as to further injure, aggravate, and irritate said back and spine.

9. Plaintiff says that the Defendants were careless and negligent in the following respects, to-wit:

First: In causing and permitting to be used in said train, a car which was in a defective, dangerous and unsafe condition, as herein set forth:

Second: In causing and permitting to be used in the train said car when the door and its other appurtenances were inefficiently operative and defective, as herein set forth.

[fol. 9] Third: In causing and permitting to be used in said train, a car whose door would not open sufficiently to permit the free and unhindered loading of mail bags, as herein set forth.

Fourth: In failing and neglecting to provide or supply Plaintiff with efficient and proper help and assistance in loading said car and avoid injuring him, as herein set forth.

Fifth: In causing and instructing Plaintiff to load said car over and above his protestations when its door was jammed and out of repair, as herein set forth.

Sixth: In failing and neglecting to make any inspection or proper inspections of the defective, dangerous and unsafe condition of said door, as herein set forth.

Seventh: In failing and neglecting to warn Plaintiff that he would injure himself or liable so to do because of the difficult and hazardous conditions surrounding the performance of his work, as herein set forth.

Eighth: In failing and neglecting to provide safe ways and means, safe equipment and appliances, and a reasonably safe place for plaintiff to perform his labor.

Ninth: In negligently stacking and piling said baggage against the door of the car so as to prevent it from being readily opened for the purpose of loading freight, as herein set forth.

Tenth: In failing and neglecting to repair said door or remove said freight from the door so as to permit it to freely open, as herein set forth.

10. Plaintiff says that the Defendants knew all of said dangers and conditions, or, in the exercise of ordinary care [fol. 10] should have known of said dangers and conditions, so that solely by reason of the negligence of Defendants herein, proximately operating, he was injured, as aforesaid.

11. Plaintiff says that prior to sustaining said injuries, he was in good health, 50 years of age, earning and capable of earning Three Hundred Twenty (\$320.00) Dollars or more per month, but that ever since sustaining said injuries, he has been sick, sore and disabled, and will continue to be sick, sore and permanently disabled, by reason of said injuries, for the rest of his life, and that by reason of said injuries he has been incapacitated from performing gainful employment, whereon he is dependent for a livelihood.

12. Plaintiff says that he is a citizen of the Commonwealth of Pennsylvania and a resident of the City of New Castle and that the amount in controversy, exclusive of interest and costs, exceeds Three Thousand (\$3,000.00) Dollars.

13. Wherefore, Plaintiff says that he has been damaged in a sum in excess of Three Thousand (\$3,000.00) Dollars, for which he prays judgment against the Defendants herein.

John Ruffalo, 510 Mahoning Bank Building, Youngstown, Ohio;

James A. Wright, 434 Diamond Street, Pittsburgh, Pennsylvania, Attorneys for Plaintiff.

[fol. 11]

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, THE BALTIMORE AND OHIO RAILROAD
COMPANY, TO SECOND AMENDED COMPLAINT—
January 19, 1960

And Now, January 19, 1960, one of the defendants, The Baltimore and Ohio Railroad Company, makes answer to the Second Amended Complaint as follows:

First Defense

This defendant admits the allegations of paragraphs 1, 2 (excepting the allegation as to "freight" and allegations

as to operations, etc., under alleged incorporation in Ohio), and 12 of the Second Amended Complaint; this defendant denies the allegations of paragraphs 7, 9, 10 and 13 of the Second Amended Complaint.

In answer to paragraph 3 of the Second Amended Complaint, this defendant admits that it permitted and allowed the other defendant, The Pittsburgh & Lake Erie Railroad Company, to use its facilities for the taking on and discharging of passengers under an arrangement between the parties, the terms of which are known to the defendants.

In answer to paragraph 4 of the Second Amended Complaint, this defendant admits that plaintiff was a baggage man employed by plaintiff and this defendant were engaged in interstate commerce and transportation; and that the plaintiff's action herein, if any, against this defendant would [fol. 12] arise under the Federal Employers' Liability Act.

In answer to paragraph 5 of the Amended Complaint, this defendant admits that on or about the 15th day of October, 1956, plaintiff was employed by this defendant as a baggage man, his duties among others, being to assist in loading and unloading baggage and mail cars at the passenger station of this defendant, and that at about 12:25 o'clock in the morning of said day he was engaged in loading mail from a truck or wagon into a baggage car in a passenger train being operated by The Pittsburgh & Lake Erie Railroad Company, and headed west to Youngstown, Ohio; as to all other remaining allegations of said paragraph 5 of the Second Amended Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

In answer to paragraph 6 of the Amended Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and therefore denies the same.

In answer to paragraph 10 of the Amended Complaint, this defendant admits that at the time alleged in the Amended Complaint, the plaintiff appeared to be in good health, 50 years of age, and he was earning and capable of earning \$320 or more per month; as to the remaining allegations of said paragraph, this defendant alleges that it is

without knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

[fol. 13] Second Defense

As an affirmative defense, the defendant, The Baltimore and Ohio Railroad Company, alleges that the baggage car into which plaintiff states that he was loading mail formed part of a passenger train of The Pittsburgh & Lake Erie Railroad Company, a corporation, and neither the said car nor the said train was owned by the defendant, The Baltimore and Ohio Railroad Company, nor did it have any control or right of control over any part of the same.

Third Defense

This defendant states that if the plaintiff did sustain an accident as alleged by him, the same was not due to any negligence on its part, or its agents, servants and employees, but was caused in whole or in part by the negligence of the plaintiff in failing to look out for his own safety, and therefore pleads contributory negligence of the plaintiff as a defense in diminution of damages.

E. V. Buckley, Mercer & Buckley, Attorneys for
defendant The Baltimore and Ohio Railroad Company.

[fol. 14]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TRIAL—April 13, 1961

The Evidence

Jury trial held in Pittsburgh Pennsylvania commencing
on April 13, 1961 before the Honorable Rabe F. Marsh, D. J.

Mr. Ruffalo: Members of the jury, I would like to take the opportunity to read to you certain matters which have been agreed on or stipulated upon in this law suit between the parties, the plaintiff and the defendant.

It is stipulated to and agreed to 1. that Michael Shenker, plaintiff, was a baggage man employed by the defendant, the Baltimore & Ohio Railroad Company, at its station in New Castle, Pennsylvania.

2. The general employment of the plaintiff, Michael Shenker, was in interstate commerce.

3. Both defendants are engaged in interstate commerce.

The Court: Can we change that stipulation to read that at the time of the accident, both—

Mr. Ruffalo: At the time of the accident.

The Court: Both plaintiff and defendant companies were engaged in interstate commerce.

Mr. Ruffalo: Yes, Your Honor.

The Court: Is that all right?

[fol. 15] Mr. Mercer: That's all right.

Mr. Ruffalo: 4. The Pittsburgh & Lake Erie Railroad Company, the other defendant, was authorized by contract with the Baltimore & Ohio Railroad Company to use the facilities of the station at New Castle, Pennsylvania, for the taking on and discharging of passengers and the loading and unloading of baggage and mail.

5. On October 15, 1956, at about 12:25 o'clock in the morning of said day, plaintiff was loading mail from a truck or wagon into the baggage car of a passenger train being operated by the Pittsburgh & Lake Erie Railroad Company and headed west to Youngstown, Ohio.

6. Plaintiff claims to have injured his back while in the process of loading mail.

7. Plaintiff reserves the right to offer statement from defendant's answers and from defendant's answers to certain interrogatories which he, the plaintiff, believes to be admissible.

It was also agreed upon and stipulated by counsel for the plaintiff and counsel for the Baltimore and Ohio and Pitts-

burgh & Lake Erie Railroad Company that if Dr. Arnold, the doctor who operated upon the plaintiff, would not attend this trial, that it would be permissible to state and stipulate to the fact in these words, that the defendant further stipulates that in the event it should be impossible for the doctor to come to Pittsburgh to testify, then the defendant hereby stipulates that in January of 1957, Dr. Arnold per-[fol. 16] formed an operation for a ruptured intervertebral disc at L-4 on the left side of the plaintiff.

At this time, the plaintiff would like to read the answers to the interrogatories which were propounded by the plaintiff and which answers were given by the defendant, the Baltimore & Ohio Railroad Company and the Pittsburgh & Lake Erie Railroad Company.

Question 4: Give the number of the train onto which plaintiff was loading baggage on October 15th, 1956 at the New Castle Station. Train No. 79.

5. State the time said train left the Pittsburgh station.

The Court: What interrogatory is that?

Mr. Ruffalo: No. 5. Subsection (a), question under that. State the time said train arrived in the station in Mahoningtown, New Castle, Pa.

(b) State the time of said train's departure from the station in Mahoningtown.

(c) State the time said train was due to arrive in Youngstown, Ohio.

And the answer to that is that the train left Pittsburgh at 10:50 p.m. (a). There is no record of the time of train's arrival in Mahoningtown, New Castle, Pennsylvania.

(b) The time of the train's departure is stated as 12:25 a.m.

(c) The time of its arrival in Youngstown was one a.m. [fol. 17] Interrogatory No. 8: State the point of origination of the train onto which plaintiff was loading baggage and freight. The answer to that Question 8 is Pittsburgh, Pennsylvania.

Then (a) under that, State whether or not baggage and freight was loaded onto the baggage car at the point of origination. The answer to that is yes.

Interrogatory No. 9: State whether or not said train had made any stops prior to the New Castle stop to take on baggage or freight. The answer to No. 9 is yes.

(a) under that, If the train had made any stops prior to New Castle, give the name of the place where these stops were made.

It states (a) Coraopolis, Aliquippa, Beaver, Beaver Falls, New Brighton and Wampum.

(b) State whether any baggage or freight was loaded or unloaded at these stops. The answer to that is yes.

Interrogatory No. 12: Give the length and width of the bed of the mail truck used on October 15, 1956 by the plaintiff in loading mail onto the baggage car.

The answer to 12 is Length of bed, 119 inches. Width of bed, 48 inches.

(a) State whether said car is a four-wheel, three-wheel or two-wheel baggage truck. The answer is four-wheel.

(b) State whether said truck is manually drawn or motor operated. The answer to (b) is manually.

[fol. 18] (c) State whether the height of the bed of the truck from ground level. The answer to that is 37 inches.

(d) State whether the truck is equipped with pneumatic or hard rubber tires. The answer to (d) is no.

Interrogatory 13: Give the dimensions of the canvas bags used for baggaging mail, freight and other commodities.

The answer to that: Different sized canvas bags are used for bagging mail which the plaintiff alleges he was loading. The larger of these is 31 inches wide and 37 inches deep. The smaller is 24 inches wide and 35 inches deep.

Interrogatory 14: State the number of men employed in loading baggage onto the baggage car on October 14 and

October 15, 1956 between the hours of 11 p.m. and seven a.m. The answer is one man.

(a) Give the name of the men who were employed. Answer: Michael Shenker.

Interrogatory 17: State whether or not the Pittsburgh & Lake Erie Railroad Company maintains any employees at said station. The answer to 17 is no.

(a) State whether or not the Pittsburgh & Lake Erie Railroad Company has any supervisors at said station for the purpose of supervising the loading and unloading of baggage cars. The answer to that is no.

(b) State whether or not the Pittsburgh & Lake Erie Railroad Company maintains any inspection supervisors [fol. 19] of the loading and unloading of baggage on its trains on said station. The answer to that is no.

Interrogatory 20: State whether or not passengers of the Pittsburgh & Lake Erie Railroad Company are boarded and discharged at said station. The answer to that is yes.

21: State whether or not tickets are sold at said station for passage on the Pittsburgh & Lake Erie Railroad Company. Yes.

22. State in whose employ the ticket agent is. The Baltimore & Ohio Railroad Company.

24. State the hourly rate of pay of the plaintiff on October 15, 1956. His hourly rate of pay at that time was \$1.8663.

Interrogatory 25: State whether or not there has been given any wage raises in plaintiff's job classification. The answer to that is yes.

(a) If raises have been given, give the amount and the date for each raise given.

Answer: November 1, 1956, 10 cents per hour.

May 1, 1957, 3 cents per hour.

November 1, 1957, 12 cents per hour.

May 1, 1958, 4 cents per hour.

November 1, 1958, 8 cents per hour.

These questions are admitted in evidence and you may, members of the jury, accept them as admitted evidence. Thank you.

.

[fol. 20] Michael Shenker, the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. Will you kindly state your name?

A. Michael Shenker.

Q. Where do you live?

A. New Castle, Pennsylvania. 404 Connor Avenue.

Q. How old are you?

A. 53.

Q. Are you married?

A. Yes, sir.

Q. How far did you go in school?

A. Part of first year high school.

Q. Are you employed?

A. Well, I am not working now.

Q. Where were you employed?

A. B & O Railroad.

Q. How long have you been employed by the B&O Railroad Company?

A. You mean now? If I was there yet?

Q. How long were you employed by the B&O Railroad Company up until the date of your injury?

A. Oh, going on five and a half to six years.

Q. In what capacity were you employed by the B&O Railroad Company?

A. Baggage man, mail man, caller.

Q. Going to the morning of October 15th, 1956, at about 12:25 o'clock, what occurred on that date?

A. Well the mail men brought the mail down. I loaded my mail on the truck. I got the mail loaded. I pulled it across the tracks, over to the P&LE Station. I spotted my [fol. 21] truck where I thought the train would come in and waited for the train.

Q. When the train came in, what did you do?

A. They stopped, pulled my truck up by the door and locked the wheel and waited to see if get the door open. Couldn't get the door open, tried to push the door up with my hand on it. I put my hand on it, tried to help them, couldn't get it open. Baggage man told me, get it out the best we could, throw mine around the corner. He handed his out to me.

Q. What did you say to the baggage man there, if anything?

A. Well, do you mean conversation?

Q. Did you have any conversation with him?

A. We talked about the mail. We talked about the door.

Q. What did he say?

Mr. Mercer: Wait a minute here. I object to this hearsay.

The Court: Objection overruled.

A. He said about the mail, what I told you, about throwing mine around the corner and about the door, you couldn't get it open. He says, "Well, can't get it open, so do it in the best way we can." He told me about having to report to get the door fixed. Never fixed it yet.

Q. Which direction was that train headed?

A. Going west.

Q. To where?

A. Towards Youngstown.

Q. What direction was your baggage truck?

A. West.

[fol. 22] Q. Where were you standing on the baggage truck?

A. On the back end of it.

Q. How many bags of baggage did you have on the baggage truck?

A. Twenty to twenty-five bags.

Q. And where were they located?

A. Towards the front end of my truck.

Q. That would be the west end of the truck, wouldn't it?

A. Yes, sir.

Q. Describe how you would place those bags on the baggage car?

A. Well, you get the bag, you pick them up, turn your leg, swing them around, push them into the hole.

Q. What was the width of the opening of the door as you were loading these bags into the baggage car?

A. 18 or 20 inches, whatever that is.

Q. How many bags did you have on the baggage—

A. Twenty to twenty-five. There were some carried through that day. The train brought it through, they took it to the post office and that night, the mail man brought it down. He says, they was carried through. You put them on 79 and send them back.

Q. What were the contents of those bags?

Mr. Mercer: I object unless he knows.

A. I don't open the sacks. I know different—bulky stuff. Some have weights heavier in the bottom than in the top, but I don't know what's in them. We are not allowed to open the mail.

Q. What was the weight of the bags?

A. Well, some are 25 to 50 pound. Some are 80 to hundred pounds.

[fol. 23] Q. Will you explain to us just exactly what you were doing at the time that you injured your back?

A. Well, the small ones I got through all right. The larger ones I had to twist around, and had to keep pushing and forcing them, trying to move stuff so it would go through the hole. Used a lot of pressure on them. Something snapped in my back. I didn't feel no pain. I kept on. Towards the end, after getting his mail out and towards the end, I tried to straighten up. I see there's something wrong with my back. Started hurting like the dickens, so I finish. I got off the truck and the guy works down at Wampum, Moffatt, he was standing right there. He got in back of my truck. I got in the front end. Was going to pull my truck over, after the train went. He got in the back and helped me across with the truck to get there. Then he helped me load the mail in the truck.

Q. When you got over to the station of the B&O station, what did you do then?

A. I went right in to report to the ticket clerk. He is my boss at night, Mr. Banks.

Q. What did he tell you to do, if anything?

A. He asked me if I could make it or wanted to go home. I says no, it's the hardest train I got. I will try to stick it out because I had some janitor work to do, I did, besides loading the trains. I did that, took my time. In the morning I had a couple of trains but they was not hard. So I got through and he told me to report to Mr. Boyd in the morning. I went home before Mr. Boyd came to work. So in the morning I called him up and I told him "I got hurt and Mr. Banks told me to call you up." I called him up and he tried to get me to come to work. I says, "I don't know if I can make it." So he says, "You come on out and we will get [fol. 24] you some help to help you work." So I took him at his word and I went out and tried to get along.

Q. Where did you injure yourself? Whereabouts?

A. In the small of my back here.

Q. That morning of October 15, 1956, did you have pain in your back?

A. After I got hurt, yes.

Q. Where was that pain located?

A. Well, in my back and it started going in my leg. I started limping, and I walked over in a kind of a crouch.

Q. What leg did it bother?

A. My left leg.

Q. And on the following day, did you return to work?

A. Yes, sir.

Q. Did you perform your usual duties that day?

A. I done the best I could.

Q. Were you in pain?

A. Yes, I was walking limping.

Q. Did you see a doctor?

A. They didn't send me to the doctor until four days after on the 19th. They sent me to a doctor.

Q. What doctor did they send you to?

A. Dr. Banister, because there's supposed to be another doctor I supposed to go to and they told me they're in convention for I should go to see Dr. Banister while they are gone.

Q. What did Dr. Banister do for you?

A. He talked to me and asked me how I felt. He asked me if I want to go home. I told him, they promised me some

help and I tried to stick it out because I had a vacation [fol. 25] coming in two weeks. So he gave me some pills to try to help me out.

Q. How long did you continue to work?

A. Until the 30th. I think the last day was the 30th of October.

Q. Did you have any further incident with your back while working during that period of about two weeks?

A. Yes, sir. We had a barrel of fire brick one night and it was real heavy and it was gone from No. 9. It was supposed to go for an engine to Willard because they needed bricks real bad to fix the engine. I tried to lift that barrel on No. 9 and I couldn't do it. I hurt myself more.

Q. During this period of time, did you have any help or assistance?

A. Mr. Banks got a chance, when he wasn't selling tickets, if he could get a chance to help me, he seen I was in misery so he helped me out.

Q. Did they provide any particular help, any additional employees?

A. No, sir, just what I could get ahold of.

Q. Did you complain about this?

A. Yes.

Q. To whom did you complain?

A. Complained to Mr. Boyd.

Q. What did he say to you?

A. He says, "I can't find anybody to take your place."

Q. Did you have any further incident involving your back before you finally left work?

A. I had a load of papers come in one night. That was towards the last day or night when I worked. They most generally come on two times, but this night came all at once. [fol. 26] I had to stack them papers on the truck, pile them up and put them away under the roof, where they keep the papers and I was bending, I had to bend over and keep them straight so get them all on. I bent over too far and something let loose in my back.

[fol. 33] Q. Would you tell us about the number of cars that you serviced during the course of an evening's work?

A. Well, there's five or six cars. I don't remember just right. I remember I had three or four, maybe four P & L E and I had a couple B & O cars. I worked different times. Some came in the morning and some came in the evening. Between time I'd have to do janitor work.

Q. About what would be the quantity of baggage you would have for each train?

A. Oh, they vary.

Q. Well, can you give us some estimate as to the quantity of baggage that you might have?

A. No. 9 takes quite a good bit. I worked two doors on that. He takes parcel post in one door and mail on the other door, mail car.

Q. On the other cars, what would you average, the number of bags or pieces of baggage that would be put on these various cars?

[fol. 34] A. Well, the morning one, it didn't take too much, maybe four, five and maybe a little bit come off. 79 was one of the biggest trains that I had to work. No. 9 on the B & O.

Q. What would you estimate the average weight of these pieces of baggage to be?

A. Well, some 25 to 50. Some of them 80 to a hundred maybe more.

Q. Would you tell us about how much time you had in which to load baggage on these trains?

A. You could do it in about five minutes. We'd get letters on it for delaying trains.

Q. Will you describe for me the station at B & O station and the P & L E station and tracks that are there?

A. Well, B & O station is one side and there's an eastbound and the westbound B & O track and across from the B & O station that's on the south of the B & O station is the P & L E station. It's between two tracks, eastbound and westbound.

Q. How many tracks are there immediately in front of the B & O station?

A. There's one right close and there's a little space and you go over another track. That's two B & O has.

Q. When you would take your baggage truck over, what direction would you take it?

A. South.

Q. South. About how many feet was it from the B & O station to the P & L E station where you placed your baggage car on?

A. Oh, around 75, 80 feet, I suppose.

[fol. 36] Q. Will you explain for me just exactly what you were doing at the time that you were putting this bag into the baggage car the morning of October 15th at 12:25 a.m.?

A. I was trying to wiggle around, trying to force the bag in, moving this way and shifting the sack and using a lot of force. Some got little packages in there, like you have to try to move it this way so it will go in this side and you try to move around this way so it would go in this way.

Q. What was the weight of this bag, do you know?

A. That's one of them large sacks.

Q. What would you estimate the weight of that bag to be?

A. Oh, it's 80 to a hundred pounds. I had three or four of them kind to get in there.

Q. As you were putting this bag into the opening, the 20 inch opening on the car, what occurred?

A. I felt a snap in my back and I didn't feel no pain. I kept on working. I didn't feel the pain until I tried to straighten up.

Q. When you tried to straighten up, did you feel any pain at that time?

A. Felt a pain in my back and went down my leg.

Q. Were you able to straighten up?

A. No.

[fol. 37] Q. Will you describe the manner in which you walked?

A. I was leaning over, like leaning over a little bit. I couldn't walk straight. I had to walk a little crooked.

Q. You say that Mr. Moffatt was there on that occasion?

A. Yes, he worked Wampum and he got off the train and he always wait until I get mail there when he worked that turn and he'd help me across the tracks.

Q. Do you know who the baggageman was on that car?

A. I don't know them people's names. None of the cars, their names.

Q. Do you know the name of the other person who was on the baggage car?

A. All I heard is Beck.

Q. While you were putting baggage into the baggage car, did you have an opportunity to look into the baggage car?

A. Yes, seen my mail, what I got was piled against the door, because I can look in the car. It's all floor there.

Q. Will you tell me who Mr. Boyd was?

A. He was ticket agent for the B & O.

Q. Was he your superior?

A. He is over all of us.

Q. He was your boss?

A. Oh, yes.

Cross examination.

By Mr. Mercer:

Q. When did you first go to work for the B & O?

A. May the 11th, 1951.

[fol. 38] Q. What was your position at that time?

A. That time I got a job in the storage department.

Q. You were first injured while working for the B & O back in November the 19th, 1951, weren't you?

A. Around there. November, December I got injured, yes. I strained this sciatic nerve.

Q. And you were off work until March 13, 1952, weren't you?

A. No, sir.

Q. When did you go back?

A. I kept on working.

Q. You say you kept on working after November 19th?

A. Yes, sir, I kept on working.

Q. You didn't lose any time?

A. No, sir, till—I was doctoring but I was working. They sent me to Akron to Roberts and he said you go down and see Mr. Pinelli and I will tell him what to do.

Q. You kept on working that whole time?

A. Unless there was a furlough in between there. I don't know. I worked every time they had work till they made me take off. In fact, they had a furlough coming up and they put me on sick leave because I was a young man there,

they had to furlough me so they put me on sick leave. That's why they done that.

Q. When did you go to work at New Castle?

A. Station?

Q. Yes.

A. It was around March of '56. I bid the job in.

Q. What was your shift?

A. When I went over there, we worked two fellows on the afternoon.

[fol. 39] Q. What shift did you work? Did you rotate or did you work—

A. No.

Q. Or did you work the night shift?

A. There was no midnight shift then.

Q. What shift were you working in October of '56?

A. Well, I think I was working the last trick, last shift, 5:30.

Q. What time did you go to work on October 14th?

A. Well, there was midnight turn. They made three turns, instead of having two guys come in the afternoon, they made three turns. One man in the afternoon, one at midnight and one in the day time.

Q. What time did you go to work on October 14th?

A. Eleven o'clock.

Q. Was that the third trick?

A. Yes, eleven to seven.

Q. Eleven to seven?

A. Yes.

Q. How long had you been working that trick or turn or shift prior to October 14th?

A. Since July or June, around there. I don't remember the date. I know they made three turns and I bid the midnight.

Q. You worked that turn since June, is that correct?

A. June or July, I don't know.

Q. Did you always work that trick alone?

A. Yes.

Q. What were your duties during that period of time?

A. Baggage man, caller, janitor.

Q. How many trains did you have to take care of during—

A. As I say, around five to six.

[fol. 40] Q. Five or six?

A. Some in the evening and some in the morning. Between time, I did the janitor work. That's why they made third turn, so didn't have enough trains so they give them janitor work to do.

Q. Between eleven o'clock at night and seven in the morning, do you know how many trains you had to service?

A. That's a long time, four years and a half ago. 79, No. 9, No. 18, or 17, and one came in P & L E in the morning, ten minutes to seven it got in. I don't know whether it came from Buffalo or where.

Q. How many were there?

A. Five or six. I can't just remember. Five or six for sure.

Q. So you were the only baggageman on at that time?

A. There was only one man on each turn at that time.

Q. You also did janitor work?

A. Yes, sir, both stations.

Q. What kind of a station was the B & O station at New Castle?

A. Passenger station.

Q. Where you were working?

A. Passenger station.

Q. What was the platform like? Was it a nice platform?

A. Well, they got one place is bricks. One is Pinchot. Over there is cement. They got three there. They had asphalt in between the tracks.

Q. A good platform?

A. Well, wasn't good there for a while. Then they—

Q. In October of '56?

[fol. 41] A. It was rough, going over them. Rough, bumps. You bounce the tracks. If you hit the tracks you'd bump.

Q. When you went out to this Train No. 79 that night, was the train already in when you pulled your baggage cart up?

A. I got over there, I set my truck there. I wait till the train stops. I tried to get near where I think the door is going to be where he stops.

Q. What did you do this night?

A. I waited till the train come in. Had the truck there I just pulled up a little bit by the door and lock it. Little grade there.

Q. Did you talk to the baggage man inside?

A. Did I talk to him inside? I didn't go inside the car.

Q. Did you talk to him?

A. I told him.

Q. Did you talk to him?

A. Yes. We talked. He said, "We can't get this"—

Q. This was the baggage car where you were going to throw in some mail?

A. Yes.

Q. How wide did you say the door opened?

A. About 18 or 20 inches is all I can say, to my estimation. I know the sacks wouldn't go through, all the sacks wouldn't fit through, I know that.

Q. About how many—you said you had about 20 to 25 pieces of baggage on your cart, is that right? That would be about a third of that cart, is that correct?

A. No, you don't just—how you pile them.

Q. How did you pile them that night?

A. I piled it back about this far from the end of the truck. [fol. 42] We never pile them too high, just how much you got. When you got a big load, you pile them way high.

Q. What did you say to the baggage man inside?

A. I told him we was talking there about the door. I says he ought to get it fixed. He told me he had a report in on the door to get it fixed. Never fixed it yet.

Q. Then what did you do, pick up the canvas bags you had in your truck and put them in the opening?

A. Some, get ahold of them, turn around, put them in the opening.

Q. Then he picked them up and put them in?

A. No, I pushed them and he's drag them back, pushed them around the corner, get ahold of them and drag them back.

Q. Is that the way you loaded the bags from your cart on to the baggage train?

A. When the door is open, you can stand right on the truck and pitch them straight there. Pitch them right inside.

Q. Is that what you did this time?

A. No, I had to turn them around to put them in.

Q. Is that how you put them in?

A. I had to. Only way I could get them in.

Q. Actually you don't know which particular piece of bag or baggage caused anything on you?

A. I don't know what bag I got hurt on. In fact, I got a little snap. I didn't even feel no pain. I don't know which bag done it.

Q. You don't know what bag?

A. One of them big ones. That's all I know. I don't know which bag. One of them big ones.

Q. That's all you remember about that, isn't it?

A. I wasn't even thinking about nothing like that.

[fol. 43] Q. Do you know how many bags you had left in your cart when this happened?

A. Well, I don't know. I didn't count them. I don't know.

Q. Do you know how many bags you had already put on the car when this happened?

A. I had a good many bags in. I didn't have too far to go.

Q. You don't know which particular piece of baggage did it?

A. No, sir. I don't know which bag done it because I wasn't expecting anything like that.

Q. Prior to this date of October 15, 1956, they never had any help, did they, to load baggage?

A. Two guys used to work them trains when they's on the other afternoon turn. Always two guys.

Q. That would be at the afternoon shift?

A. After they changed the shift, they only had one man doing it.

Q. How many men would work one opening? One?

A. One man.

Q. There's only room for one man on one cart like you had?

A. That's all, one man works one opening: used to have two men because you have two doors on a lot of cars. One go with the mail and the other one come back with the parcel post. Work the same time so the train wouldn't be late. That's why they have the two men.

Q. Actually each baggage car had two door openings?

A. This one had one big door in the middle as I remember.
[fol. 44] Q. So on a baggage cart like you had, only one man could work at a time?

A. There's only one man on a truck.

Q. You knew Mr. Moffat, did you not?

A. I met him a little short while before I got hurt because when I took the midnight turn he worked at Wampum. That's how I got acquainted with him because I used to give him a ride once in a while up the hill. That's how I got acquainted with him because he's going up on the east side.

Q. You never requested or said anything about additional help prior to this accident, did you?

A. Who?

Q. You?

A. There was some talk at one time when they took the two turns off. They went to the union and the union said there's nothing they could do about it.

Q. But you didn't request any help prior to this accident of October 15th, '56, did you?

A. No, I was getting along. I done my work. I was doing my work.

Q. Following this after you got your mail aboard, what did you do then?

A. The baggage man started handing his out to me. I was getting them and I'd take them and start piling them in front of the truck.

Q. How many pieces did you take off?

A. Oh, 10, 12, 14, something like that.

Q. So then after you got your 20 to 25 pieces on, then he handed out the mail that was for New Castle?

A. That's the way he worked it.

Q. Then where did you deposit that mail?

A. On the truck, same truck I unloaded.

[fol. 45] Q. Then where did he take them?

A. Across the tracks, same way again to the station, backed the truck into the station. There was a mail truck from the city, waiting to take that mail back to the post office.

Q. Did you help unload it?

A. Mr. Moffat helped me unload it that night. I helped unload it the other times. Always that was my job to hand

it to the mail man, he'd take it and throw it in the truck and stack them in there.

[fol. 53] By the Court:

Q. Who paid you, what company?

A. B & O.

Q. Did you ever get paid by the P & L E for any work?

A. No.

Q. Never?

A. They didn't pay me, no.

Q. You said you did janitor work?

A. Yes, sir.

Q. At what station?

A. Both stations.

Q. Both stations?

A. P & L E and B & O.

Q. What did that consist of?

A. Well, to keep the floors clean, you had to scrub them two times a week and keep the paper off the windows, stuff off and keep the benches all clean so the people can sit down. They won't get their clothes dirty.

Q. The B & O paid you for all that work?

A. That's right, that's where I got my checks, from the B & O.

Q. You stated you called trains. You were a caller?

A. Not call trains. I had to go call the men. They was called out for an engine, like brakeman or fireman, they called up the station. Ticket agent would go tell me to call a man to work. He might be living in a hotel or house up the street. I'd take a book with me and go see the man personally and go to see him. If he'd gone to work, I'd have to [fol. 54] mark o.k., he's o.k. to go out to work. I'd have to go back and call the ticket agent everything is all right. Then he'd call in and say he can come to work.

Q. That's what you mean by being a caller?

A. Yes, sir.

Q. You did not call the trains?

A. No, no, no trains. People.

Q. Did you ever call people that worked for the P & L E Railroad?

A. No, just B & O. That's all I know.

The Court: Anything else?

Mr. Ruffalo: I have nothing further.

A. I wanted to say something.

The Court: You can talk to the lawyer if you want to say something. You don't need to talk out loud. It might not be the right thing. Sometimes a witness wants to say something that's the wrong thing and that's the end of the trial. It's tried all over again. We just want to protect you from that. Go ahead.

By Mr. Ruffalo:

Q. When you make these calls, will you explain "who you called?"

A. I want to get the man that he told me now. He worked for the railroad. I don't know where the call came for him where the man worked.

Q. Do you know whether it's a call for a B & O employee or P & L E?

A. No, that's what I mean. He told me to go get this man for the railroad. I don't know whether they called, they are called there or not.

[fol. 55] Q. You don't know whether it's a B & O man or a P & L E man?

A. No.

By the Court:

Q. Who told you to get them?

A. Ticket clerk.

Q. That's the B & O boss?

A. Yes, he was ticket clerk with the boss. Main foreman, he worked day time, all the time.

Q. That's Mr. Boyd?

A. Yes.

Q. Maybe we can find out from him.

A. O.k. Mr. Banks ought to know what that is.

The Court: We will recess until tomorrow morning. Is it convenient if we recess now until tomorrow morning?

Mr. Ruffalo: It is for me.

The Court: We will recess until tomorrow morning and ask you to be in your places at ten o'clock. Jury may retire.

• • • • •

Morning Session in Chambers

Tuesday, April 18, 1961

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Gentlemen, there seems to be an inconsistency in this case or I just don't understand it. In the P & L E answer and the stipulation read to the jury it seems that the P & L E Railroad was authorized by contract with the B & O to use the facilities of the B & O station at New Castle, for taking on and discharging passengers and load- [fol. 56] ing and unloading mail and baggage. That's what you have stipulated, but the proof shows as Mr. Ruffalo stated in his opening, that the plaintiff was employed by the B & O as a baggage man at the New Castle Station where there were two tracks of the B & O trains and two tracks for the P & L E trains and the B & O employees serviced the P & L E trains at the B & O station.

The evidence indicates that there were two stations in New Castle, one for the B & O trains and one 75 to 80 feet south of the B & O station for P & L E trains. Now, what is going on here? Are there two stations?

Mr. Ruffalo: Yes.

The Court: How come you stipulated?

Mr. Wright: Only one ticket office.

The Court: You don't say that. You don't even mention the ticket office. You say that the P & L E Railroad Company was authorized by contract with the B & O to use the facilities of the B & O station at New Castle for taking on and discharging passengers and loading and unloading mail and baggage. You gave me to believe that there was one B & O station with B & O tracks that the P & L E was using. Now it turns out entirely different. What is the fact?

Mr. Ruffalo: The facts are to use the facilities in so far as the baggage trucks are concerned, so far as the baggage men and the employees and the ticket office, they use the

station for their passengers to wait in and so forth like that, [fol. 57] where the other station is practically closed. It only has a light on the door at night. There's no service there of any kind. The people get off—the trains come in on the P & L E track. All P & L E trains come in on the P & L E tracks. They take on passengers off the P & L E loading platform and discharge them. They take off mail and put on mail on the P & L E platform, but all the facilities of the operating facilities are the operating facilities of the B & O Railroad.

The Court: Why don't you stipulate there were two stations there? One was a P & L E station serviced by P & L E tracks where P & L E passengers got off and where baggage was loaded on. You don't have any mention in this stipulation about two stations. You gave me to believe that all this was on the B & O station, on the B & O tracks. Your stipulation indicates that.

Mr. Wright: Fred, do you agree with the facts as John has outlined them? Is that your understanding?

The Court: Counsel is completely irresponsible to the Court in the stipulation where the facts were so plain as apparently they are. You misled the Court. You give the Court a false impression.

Mr. Ruffalo: I am sorry about that, Your Honor. That was not my intention in any way. Of course, I had raised a question about the contract existing and agreement existing between these parties.

The Court: They weren't using the facilities of the B & O station at all. They were using their own facilities, their own track, their own station.

[fol. 58] Mr. Wright: They are using the waiting room and ticket station.

The Court: That is not the point. You don't even tell me there's two stations. You don't even tell me there's two P & L E tracks. You don't even tell me the P & L E was using its own station and own tracks. The baggage was being loaded at the P & L E station. The train was on the P & L E tracks. None of that stuff is disclosed anywhere. In fact, the whole tenor of the answer, the whole tenor of the stipulation is that they were using B & O facilities, to wit, the station, the B & O tracks, B & O baggage man, B & O

truck. No mention that he had to cross 80 feet from the B & O to the P & L E station or where the P & L E train was. It seems to me very easy to have stipulated the actual facts in the case. I am inclined to continue the case and order another pretrial.

Mr. Ruffalo: Inclined to what?

The Court: Continue the case and order another pretrial, where you set forth these things that we know were going on. It burns me up that facts apparently as easy to stipulate as that are just hidden from the Court. I had no idea until that man took the stand that there were two stations up there.

Mr. Wright: I don't know. Is that station in use at all?

Mr. Ruffalo: No.

Mr. Mercer: I join in your motion.

The Court: It would be at your cost, at your cost. You are the fellow that should have brought those out.

[fol. 59] Mr. Mercer: I chanced that.

The Court: Sure you did. You entered into the stipulation.

Mr. Mercer: May I have a few minutes? I'd like to find out from Al Williams what the facts are. Can I have a minute?

Mr. Wright: I believe the defendant prepared the stipulation.

The Court: The only people that would know about it, although you people ought to have known there were two stations, two sets of tracks.

Mr. Mercer: Let me ask Mr. Williams if the situation is the same up there as it is in Pittsburgh.

The Court: Well, I don't know.

Mr. Mercer: I'd like to ask Al if it isn't the same situation up there as it is up here.

The Court: Let's get the jury.

Mr. Mercer: We had a B & O station.

Mr. Ruffalo: Are we going to go ahead or withdraw the juror?

The Court: What do you think I ought to do?

Mr. Wright: Judge, I don't think anybody is too hurt.

The Court: I am quite disgusted with all of you.

Mr. Wright: They did use some of their facilities, but they did use their own tracks. Apparently the station is in misuse.

[fol. 60] The Court: I just point out how confusing you have been. Pretrial is to give a trial judge an idea of what the facts are, the undisputed facts, at least.

What we will do, I expect a stipulation on the full facts existing up there to be in writing and hand it up to me at two o'clock. We have the lunch hour. We will adjourn a little early so you will have time to prepare it.

We will strike out that inconsistent stipulation which I think is No. 4 in your pretrial stipulation, and substitute the one you prepare today which will be in accord with the evidence and will specifically and in detail tell the jury and me about those two stations and those two tracks and all other relevant details that are undisputed. Is that all right? We will go on.

Mr. Ruffalo: Can we have the right to read that stipulation to the jury if it is amended or not?

The Court: If it is stipulated certainly it will be read to the jury.

In Open Court

RICHARD H. MOFFATT, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. What is your name?

A. Richard Moffatt.

Q. Where do you live?

A. 121 Richlieu Avenue, New Castle, Pa.

Q. Where are you employed?

A. I was unemployed.

[fol. 61] Q. Where were you employed?

A. Furloughed from the P & L E Railroad.

Q. Are you furloughed at the present time?

A. Yes.

Q: What was your capacity with the P & L E Railroad Company on about October of 1956?

A: I was relief ticket clerk at the time.

Q: Where were you stationed?

A: I used to work four days at Wampum and one day at Beaver Falls. I'd work two days day turn, two days afternoon turn and one afternoon turn would be revolved.

Q: How long had you been employed as relief station agent at Wampum?

A: I couldn't say all together. I have been jumping around from New Castle to Wampum, Ellwood City, like that, all the time for 13, 14 years.

Q: What trick did you work?

A: I worked two days day turn, two days afternoon turn and one day Beaver Falls afternoon turn.

Q: What hours of the day did you work?

A: Usually be about four, four-thirty to twelve-thirty.

Mr. Mercer: At what period of time, what year?

Q: During the year 1956 or specifically October of 1956.

A: That would be along about 4:30 to 12:30.

Q: That would be 4:30 p.m. to 12:30 a.m.?

A: That's right.

Q: On October 15th, were you working as the relief ticket agent at Wampum?

A: That's right, ticket clerk, that is.

[fol. 62] Q: Will you explain what you did that evening after you ceased your employment at 12:30 a.m.?

A: I rode up in the last train from Pittsburgh and got off at New Castle, Pa.

Q: What train was that?

A: No. 79.

Q: That gets into New Castle?

A: That is a regular scheduled time but the mail would be late five, ten minutes along the line. It could vary half an hour, an hour sometimes.

Q: When you arrived in New Castle, what did you do?

A: Well, I usually rode up with the mail man or rode up with the baggage man. Depends on which one I could get because there was no bus service there from New Castle. They had discontinued that in evening service. I got off the

train and I'd walk up to the baggage coach and watch the mail unload there.

Q. Do you recall who was working as baggage man at the Mahoningtown station that evening?

A. Mike Shenker.

By the Court:

Q. What?

A. Mike Shenker, whatever it is. I can never pronounce it. Mike anyhow.

Q. You were working with the plaintiff here, is that right? Is that what you mean?

A. Yes. No, he was working on the baggage car. When I come off the train I walked up to where the baggage cart was being pulled against the coach and loading the mail in. I can explain further if you want me why I was up there, if you want me to tell you.

[fol. 63] By Mr. Ruffalo:

Q. Go ahead, explain if you wish.

A. All right. I went up there and always on account of the train would be pulling across the crossing. I had to go down through the tunnel and through other way. We always wait until that train would pull out and take the baggage cart across. I'd help them push that cart across the tracks, because after it was loaded in the mail truck, I used to ride up with the mail truck, New Castle, about three mile.

Q. Did you see Michael Shenker loading bags on the baggage car that morning?

A. Yes, sir.

Q. Did you see how many bags were on his truck at that time?

A. Oh, I'd say roughly by the time I got up there, would be 20, 25.

Q. Did you observe the car door, the baggage car door?

A. Yes, sir.

Q. What would you say was the width of the opening of that car door?

A. Well, I'd say roughly about that far. I'd say maybe 20 inches, 24, around in that neighborhood.

The Court: I can't hear.

A. 20 inches, 24.

Q. Did you observe the size of the bags which were being loaded on the baggage car?

A. Well, not particularly. Only just the ones they'd be putting by the door. I paid no attention to them. Most of them were ordinary small sizes. A few large ones.

[fol. 64] Q. After the baggage was loaded and the mail was taken off the baggage cart, did you observe Mike Shenker?

A. Yes, sir.

Q. Did you see anything unusual at that time?

A. Well, he started to get off the truck. He says, "I hurt my back" and he held like that there (indicating).

Q. What did you do then?

A. Well, he got on the front end of the truck and I got on the back end of the truck. We pushed it over to the three tracks over to the mail truck. I unloaded what was on the back of the trucks to the mail truck and I rode up with the mail man.

Q. Did you see Mike Shenker any more that morning?

A. No, sir.

Cross examination.

By Mr. Mercer:

Q. When you got off this train, Mr. Moffat, where did you go?

A. Went up to the baggage cart. Walked up along about two or three coaches.

Q. How many carts did you see out there?

A. Well, there's one alongside the train.

Q. How many men—had you ever done this before?

A. Yes, sir.

Q. How many men would work one cart?

A. One man.

Q. Did you observe the baggage cart itself?

A. Yes, sir.

[fol. 65] Q. And about how filled was it?

A. I'd say about a third.

Q. Were you just standing there as this baggage cart was being loaded onto this train?

A. That's right.

Q. I presume the baggage cart itself was up against the side of the train?

A. That's right.

Q. I also presume that Michael Shenker was on the baggage cart?

A. That's right.

Q. And did you observe what he did?

A. He was throwing mail into the coaches, into the mail truck or the mail car.

Q. You state he was throwing mail from the cart into the coach?

A. That's right, into the baggage car.

Q. Baggage car?

A. That's right.

Q. Did he just place these sacks or bags up on to the opening?

A. Small ones that are just flat why he just tossed them in. The ones that were a little larger than ordinary, he'd stand them on the end and push them over.

Q. Push them over where?

A. Into the truck.

Q. Is that all he did?

A. Yes, sir.

Q. Are you able to judge or tell us whether this was normal procedure?

A. Well, for the door being open like that, that was about the only way you could handle it. Ordinarily you'd throw [fol. 66] it in maybe sideways, that's all, but it's normal for the condition the way the door was there open.

Q. You didn't notice anything abnormal about this procedure?

A. No, sir.

Q. Did you know Michael Shenker before this incident?

A. Well, all I know since he worked down at this B & O Railroad, coming back and forth there would pass him. I knew him there for possibly maybe six months. I used to

ride up home with him at night and I knew him well enough we used to discuss his back injury on the way home.

Q. Discussed his back injury?

A. Yes, sir.

Q. Was this prior to this accident?

A. Yes, sir.

Q. You mean he discussed the back injury, is that since 1951?

A. Well, I couldn't state any date or particular time at all, just telling me about the condition he was in.

Q. About how many times would you have ridden with him?

A. Oh, I'd say 10 or 15 times all together.

Q. Would this be prior to the date of this particular incident October 15, 1956?

A. Yes, sir.

Q. Do you know when he came to work on this particular shift with the B & O?

Mr. Ruffalo: I object. This is not particularly cross-examination. It wasn't brought out in chief.

[fol. 67] The Court: Sustained. That's not proper cross-examination. If you want to make this man your witness, you can call him later.

Mr. Mercer: I have no other questions.

Redirect examination.

By Mr. Ruffalo:

Q. Were you subpoenaed by me to come in and testify?

A. That's right.

Q. Thank you.

By the Court:

Q. Mr. Moffatt, then you rode up from Wampum on a P & L E train?

A. Yes, sir.

Q. Was that train running on P & L E tracks?

A. Yes, sir.

Q. And it stopped at the P & L E station?

A. At New Castle. It is a combination, P & L E and Wampum or P & L E and B & O. They call it New Castle.

Q. Do I understand there are two stations there?

A. Well, one is a waiting room and the other is a station but the station that the B & O sells tickets for both P & L E and B & O.

Q. Yes, but the B & O station is a separate building from the P & L E station, is that it?

A. Well, it is up in respects to waiting rooms but not on the ticket office.

Q. There are two buildings there?

A. Yes, sir.

[fol. 68] Q. One on one side and one on the other side?

A. Yes, sir.

Q. One of them is the P & L E building, the other is the B & O building?

A. Yes, sir.

Q. They sell tickets at the B & O building for both trains?

A. That's right.

HARRY LEWIS BANKS, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination:

By Mr. Ruffalo:

Q. Will you kindly state your name?

A. Harry Banks.

Q. Where do you live?

A. I live at R. D. 6, New Castle, Pa.

Q. Where are you employed?

A. I am employed at the New Castle passenger station by the Baltimore & Ohio Railroad.

Q. And were you employed by the Baltimore & Ohio Railroad Company in October of 1956?

A. Yes, I was.

Q. How long have you been in the employment of the Baltimore & Ohio Railroad Company?

A. Thirteen years.

Q. Do you recall the morning of October 15, 1956?

A. I do.

Q. Can you tell us what occurred on that morning in respects to Michael Shenker?

A. After No. 79 left, approximately 10 minutes, Mr. Shenker came into the ticket office and told me that while [fol. 69] working No. 79, he hurt his back and I asked him if he thought it was serious enough that I would call the company doctor or take him to the hospital and he told me that he thought that he'd sprained his back and he would try to finish the night out and see how it turned out.

Q. Did he finish out the rest of his tour of duty?

A. Yes, he did.

Q. Did you advise him to report this to anyone else?

A. I advised him if his back gave him any more trouble to report this to Mr. Boyd who was the daylight ticket agent.

Q. And what time did Mr. Boyd come on duty?

A. Mr. Boyd came on duty at seven a.m. in the morning.

Q. When Mr. Boyd came on duty, did you make any report to him regarding Michael Shenker?

A. Yes, I did. I gave him a written report.

Q. Did you observe the number of bags that were on the baggage truck?

A. No, I didn't. I don't go outside to see the operation of that mail. I was in the ticket office where my duties called for my line of work.

Q. Do you have enough knowledge to be able to describe what one of these baggage trucks are like?

A. Yes, I do.

Q. Would you describe them?

A. The baggage truck is a four-wheel iron wheels on it with a tong which you pull and you can steer and it has a chain on the rear wheel which you can lock to keep the truck from running away in case of wind or in case if the platform was a little down grade. While unloading the mail, you can lock the train and hold it there.

[fol. 70] Q. Have you had an occasion as ticket agent to observe Michael Shenker working?

A. Yes, I have.

Q. And prior to the date of October the 15th, 1956, did you see Michael Shenker lifting mail bags and other freight in the station there?

A. Oh, yes.

Q. Could you tell us about what the weight of some of these objects would be that he lifted?

A. Well, you mean U.S. mail or baggage or—

Q. Yes, anything at all?

A. Well the U. S. mail, as I understand there's a limit of 83 pounds to the weight of mail sacks. Of course, it could vary anywhere from five pounds up to the 83 maximum pounds and it's possible that it would go heavier than that if a postal employee was careless of loading sacks and got more in the mail sacks than he should have.

Q. How long had Michael Shenker worked on this at the time you were working there?

A. He'd worked approximately four months up to the accident.

Q. And at any time during that four months' period, did you ever hear any complaint of his back?

A. No, sir.

Q. How much time did a baggage man usually have in which to load one of these baggage cars as they come in the station?

A. There's no set time limit at all. The train will lay at the station until the work is taken care of. They can't leave without the U. S. mail.

Q. That's if a mail car is on the—

A. Well, it don't have to be a mail car. A mail car is an R.P.L. car which is postal employees. Then they have a [fol. 71] baggage car that they handle fourth class mail. Regardless of what type of car it is, the train has to lay at the station until the mail is all received and then all the mail is taken off that goes to the station.

Q. What do you mean by R.P.L.?

A. An R.P.L. car is a car that's maintained by the United States Government. It has postal employees working right in the car sorting mail and distributing it along the line the train goes to make connections with other trains. It's just like a post office.

Q. Do they have such a car on the No. 79?

A. No, sir, there was not such a car on that train at any time that I could ever remember.

Q. What type of car do they call the one No. 79?

A. That would be called a baggage car.

Q. Would you describe that for us, please?

A. Well, the average baggage car is a car that has two doors on each side of it. All together it has four doors. It would have two doors on the left-hand side and two doors on the right-hand side.

Q. On occasions when you have both a mail car and a baggage car in a train, is the baggage man required to handle both cars?

A. Yes, sir.

Q. What would you say as to the ability of Michael Shenker to perform work prior to October 15, 1956?

A. Well, my observation was that he was a very good worker.

Q. Did he appear to be strong and healthy?

A. Yes, he did.

Q. Was he a willing and reliable worker?

A. He was all the time he worked with me.

[fol. 72] Q. Now, after the date of his injury, did Mike Shenker return to work?

A. Yes, he did. He worked approximately two weeks after the injury. He worked till October 30th of 1956 was his last night that he worked with me.

Q. Will you describe his appearance on those occasions?

A. Well, I observed that he was walking around humped over, claiming that his back was bothering him.

Q. Did he ever complain to you about his back after October 15, 1956?

A. Yes, he did.

Q. Do you have any knowledge of his hurting his back while working during the period of October 15 and October 30?

A. You mean after the first injury?

Q. After the first injury?

A. No, sir.

Q. Do you know the reason for his quitting October 30, 1956?

A. Well, other than what he told me, that his back was bothering him so much that he could no longer perform his duties.

Q. Have you had any experience in loading and unloading baggage?

A. Yes, sir.

Q. What is the approximate size and weight? I have asked you that before. I will withdraw that. From your knowledge, what would be the contents of these bags?

A. Well, U. S. mail they have what they call a lock pouch. That is a small bag with a lock on it that contains all first class mail, letters, registries, of any valuable origin. Then they have what they call fourth class which would be [fol. 73] a parcel post sack and it could be a magazine, sackful of magazines or circulars, things of that nature.

Q. Would they have any company equipment and material that would go on these baggage cars?

A. They have company material that would be shipped in baggage service but it wouldn't be in the mail bag. That would be loose.

Q. Would they ship any luggage on these cars?

A. Yes, sir, the railroad company has a baggage allowance where they will ship baggage on your ticket to your destination.

Q. How long did you work as a baggageman for the B & O Railroad?

A. I worked as a baggageman approximately two years.

Q. From your experience and knowledge, do you have an opinion as to whether the failure of the baggage car man to open the car door a sufficient width so as to permit the free and uncovered loading of the baggage was such as constituted a failure to provide plaintiff with a reasonably safe place in which to perform his work?

Mr. Mercer: I object to the question as incompetent, irrelevant and immaterial.

The Court: That objection is sustained. That is for you, ladies and gentlemen, to decide from the facts, not from this witness or any other witness.

Q. As a ticket agent, did you sell tickets for the B & O and P & L E Railroad Company?

A. Yes, I did.

Q. Was the passenger station used by both the customers of the B & O and the P & L E Railroad Station?

A. Yes, it was.

[fol. 74] Q. Since Michael Shenker ceased his employment with the B & O Railroad, did you have an opportunity to observe him walking about the streets of the City of New Castle?

Mr. Mercer: At what time? You mean since or before?

Q. Since I said. Since his injury, since quitting his work?

A. Well, sir, I haven't seen Mike for a long time up until the last few days.

Q. Well, when you saw him recently, would you describe his appearance and the manner of his walk?

The Court: Well, if he just saw him the last two or three or four days before the trial, I don't think we want that.

Mr. Buffalo: That will be all.

Cross examination.

By Mr. Mercer:

Q. Is the mail on 79 at this particular trick light or heavy?

A. That mail was light.

Q. What would be the duties of Michael Shenker?

A. The duties of Michael Shenker was to work mail and baggage off the B & O and P & L E trains, to do janitor work, consisting of mopping the floor, dusting the benches, keeping the rest rooms in a clean and sanitary condition and to call engineers, firemen, brakemen or conductors to work that lived within one mile of the passenger station.

Q. Were you his boss?

[fol. 75] A. I was. I was his boss over that turn. I was not the boss of the station though.

Q. I have no further questions at this time. I will at a later time.

By the Court:

Q. Did Mr. Shenker call employees of the P & L E to work?

A. No, sir, strictly B & O employees.

Q. Was there a rest room in the P & L E station?

A. No, sir.

Q. Were there benches in the P & L E station?

A. Yes, sir.

Q. Was it open?

A. It was open to the public.

Q. Did the P & L E have any boss there that night?

A. No, sir, the P & L E didn't have any employees whatsoever connected with that operation there.

Q. Under whose supervision was Mr. Shenker?

A. He was under the ticket agent, Mr. Boyd.

Q. On that turn when he got hurt?

A. On that turn he was under my supervision.

Q. During the four months you say he worked there, did any P & L E employee give directions or orders to the plaintiff?

A. No, sir.

Q. From whom did he receive direction and orders, instructions?

A. From me or Mr. Boyd would let me know what he wanted done and I would tell Mr. Shenker.

Q. And you and Mr. Boyd were exclusively Baltimore & Ohio Railroad employees?

A. Yes, sir.

[fol. 76] The Court: Anything else?

Mr. Mercer: Not at this time.

DONALD RUNYON, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ruffalo:

Q. Will you kindly state your name?

A. Donald Runyon.

Q. Where do you live?

A. I live at 207 South Ashland Avenue, New Castle, Pennsylvania.

Q. Are you employed?

A. I am unemployed right now.

Q. Were you employed by the B & O Railroad in October, 1956?

A. Yes, sir.

Q. How long have you been employed by the B & O Railroad up until October of 1956?

A. Approximately three years in 1956.

Q. In what capacity were you employed by the B & O Railroad?

A. From February, 1956 for the rest of the year, I was employed as a baggage man.

Q. You were a baggageman working at the station in Mahoningtown, Pennsylvania?

A. Yes, sir.

Q. Did you have occasion to see Michael Shenker at the station?

A. Well, I worked right with Mike. The first part in 1956, he was working the three to eleven and I was working [fol. 77] the eleven to seven and then I bid down into center yard, another clerical department. When I done so, Mike bid my 11 to 7 in. I bid back on to 11 to 7 shift. We switched turns in the middle part of 1956.

Q. During that period of time, did you have an occasion to watch Michael Shenker load bags and baggage on to the baggage car?

A. Not actual loading because he would work one turn. I worked another turn but he would either help me or in our turns I'd come out early if we had to take these papers across. It's too much for one man. Both of us would take them off or if heavy stuff to load, we would load it together before he went home or before I left.

Q. Do you recall that day that you worked down there at the station as a baggageman?

A. It was in the early part of October, I believe around the 8th.

Q. That was just about a week before Michael Shenker injured himself, is that right?

A. I believe he stated he got hurt on the 14th or 15th, so I would say it was approximately a week.

Q. During that period of time that you worked or overlapped your shifts with Mr. Shenker, did you ever hear complain about his back?

A. No; he never complained to me and I never noticed any physical, because he would—in fact, do heavier work than I would. He would have to help me.

Q. Did he always seem strong and healthy?

A. Yes, like I stated, these papers we used to get, we would get off on the afternoon turn, they would be too heavy to take across. If I was on the 11 to 7 turn, I would come out early and we'd take the papers over together. If there was heavier company material or stuff to put on the [fol. 78] truck, why he would put it up on the trucks so I wouldn't have to load it.

Q. What would you say the weights or the approximate weight that he was able to lift?

A. I would say Mike could lift a hundred pound with ease. Now I am not saying that the objects were over a hundred pound, but from the estimation of the weights, I would say he could lift a hundred pounds with ease.

Q. Did you at any time service as baggage man Train No. 791?

A. In the early part of 1956, I did, because I was on the 11 to 7 turns.

Q. Did you ever have any experience with having any difficulty with the door on No. 791?

Mr. Mercer: Now just a minute, if the Court please. I believe this witness is listed in Mr. Ruffalo's pretrial narrative as a condition witness. I believe now he's getting far beyond the scope of his pretrial narrative statement. I'd request if he's going to proceed, that he make an offer at sidebar.

The Court: The question as asked is irrelevant. Objection to that question sustained. If we come down to October 15th on this particular door, why we will let him testify perhaps. He wasn't there.

Mr. Ruffalo: He wasn't there.

A. No, sir.

The Court: Any other door isn't relevant to this case. We are interested only in this one door.

Q. Have you had an opportunity to see Michael Shenker after October the 15th, 1956?

A. Yes, sir.

[fol. 79] Q. Did you have an opportunity at that time to observe him?

A. Oh, yes, I have seen Michael several times.

Q. What would you say as to his manner of walk?

A. You couldn't even call it a walk because he could walk slow and it seems to me he's dragging one of his legs. I wouldn't say which one. It's sort of a bent walk. A walk in pain is what I would call it.

Q. Did he ever complain to you about pain in his back after October the 15th, 1956?

A. Well, almost every time I seen him after he got hurt he always complained. Every time I seen him, you know, he'd always complain about his back that he couldn't straighten up or he'd ride a train, he'd say he couldn't sit up straight or something like that. He'd say he was in constant pain with it.

Cross examination.

By Mr. Mercer:

Q. Have you seen Mike Shenker very often since October of '56?

A. No, I would say since October of '56, I seen him—

Q. About four and a half years?

A. I'd say I've seen him approximately oh seven or eight times, that's over a spread of a period of time.

Q. How long have you been unemployed?

A. I was unemployed from the B & O in September of last year and they recalled me the last three weeks of December of last year to work and then I am presently on the extra list at New Castle junction. Whenever they get work, they call me. It's slow now. So I only worked one day about a month ago.

[fol. 80] Q. I have no other questions.

By the Court:

Q. Who paid you for your duties as baggage man?

A. I received my wages and a check from the B & O Railroad.

Q. Were you ever paid by the P & L E Railroad?

A. No, sir, all my checks were stamped Baltimore & Ohio Railroad.

Q. That's all.

MOTION FOR DIRECTED VERDICT, ETC. (P & L E)

Mr. Mercer: Counsel for the Baltimore & Ohio Railroad Company moves this Honorable Court to direct a verdict in behalf of the defendant, for the reason that no—

The Court: On behalf of which defendant?

Mr. Mercer: On behalf of the defendant, the Baltimore & Ohio Railroad Company, for the reason that no negligence against the Baltimore & Ohio Railroad Company has been proven as shown by the plaintiff.

The Court: It's very hard to see, but maybe the jury can see it.

Mr. Mercer: Plaintiff in this case testified that he picked up bags, placed them in the entrance way to the baggage car and that there were four heavier bags. He doesn't know which bag it was that caused a snapping sensation in his back. I fail to see that there is any hazard or duty violated by the B & O in this particular case.

MOTION FOR DIRECTED VERDICT, ETC. (P. & L. E.)

On behalf of the Pittsburgh & Lake Erie Railroad Company, counsel for the Pittsburgh & Lake Erie Railroad [fol. 81] moves this Honorable Court to direct a verdict on behalf of the P & L E Railroad for the following reasons:

First, this Court has no jurisdiction. There is no diversity of citizenship between Michael Shenker and the Pittsburgh & Lake Erie Railroad Company.

2. There is no dual employment, no control by the Pittsburgh & Lake Erie Railroad Company over Michael Shenker. His duties were outlined by the Baltimore & Ohio Railroad Company and he was paid by the Baltimore & Ohio Railroad Company and told what to do by the Baltimore & Ohio Railroad Company.

3. There is no duty, hazard, shown by the plaintiff against the Pittsburgh & Lake Erie which was violated in this case. There is no actionable negligence against the Pittsburgh & Lake Erie Railroad Company; therefore counsel moves for a directed verdict in favor of both defendants.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I can't see any negligence in the case. What do you say it is?

Mr. Ruffalo: I say, Your Honor, and the fact of the failure to open the door a sufficient width and permit him to load the bags on to the baggage car and that these bags were of a large size, although he says that he doesn't know which ones of the bags, of course, they didn't have tags on them or numbers on them that were to identify them. He did testify to the fact that one of the heavier bags, one of the larger bags that he had to shove through the small opening there of 20 inches and when twisting and turning, [fol. 82] he injured himself, he recalled a snapping condition in his back and that the negligence was there in view of the fact that the railroad company, the B & O Railroad Company or its employees and agents has a continuing duty to provide a safe place in which to have its employees work and it isn't an intermittent one and he does not assume the hazards of the job, whatever they may be and he is not charged with any contributory negligence on his part.

I feel that there is ample evidence here brought forth by Mr. Shenker and corroborated by the witness Moffatt as to the fact that this door was not open a sufficient width in order to permit him to put these bags in easily and freely.

The Court: Why didn't he open it?

Mr. Ruffalo: He stated he tried to open it and he couldn't. The testimony was he put his hand up on the door and pushed on it and couldn't open it and that he asked the baggage man and the baggage man told him that the door wouldn't work and that to go ahead and put the baggage on anyway.

The Court: Well, you mean he went ahead and put the baggage on anyway?

Mr. Ruffalo: Yes.

The Court: That was his job.

Mr. Ruffalo: That was his job to do, regardless of the particular hazard. He didn't assume it.

The Court: What was dangerous? What was unsafe about a door that will only open 20 inches?

[fol. 83] Mr. Ruffalo: Well, there may be nothing unsafe about the door itself, its being opened that width, I mean. The fact is you had to put the bags through that weighed a hundred pounds or which were considerable size and bulk which would not go through this opening and which had to be pushed through and shoved through and then pushed to one side in order to get them in there. Otherwise, normally all they did prior to that time was just take them and lay them up on the edge of the floor of the car and shove them in. They didn't have to lift them and pick them up and shove them through a small space.

The Court: You have to pick them off the car and put them on, put them on the floor of the baggage car.

Mr. Ruffalo: The baggage car and the floor of the baggage truck. There's only a difference of about eight inches, six or eight inches.

The Court: I heard no such difference in the testimony.

Mr. Ruffalo: All they do is just lay them over, flop them over and then shove them in.

The Court: What is so dangerous about this? That was the point. How can you translate a door that will open only 20 inches into an unsafe place to work? Nothing unsafe about it.

Mr. Ruffalo: It's unsafe in view of the fact it isn't open sufficient to permit the baggage to flow through freely and this man had to shove them through. He had to exert a pressure and a force that he normally didn't have to use, that he normally didn't have to go through there.

[fol. 84] The Court: All I can see is a defective door. Nothing unsafe about it at all, I can see. Nothing dangerous or hazardous. It wouldn't open. It's not like having oil on the floor or big stones in the cartway or some dangerous condition. I don't know how you can translate a defective door into a dangerous, unsafe place to work.

I can see though that if the defective door played any part in causing this man's injury and the defect was due to the negligence of the defendant—

Mr. Ruffalo: We claim that the door was defective, too, in view of the fact it wouldn't open.

The Court: That's all that is in the case.

Mr. Ruffalo: Yes.

The Court: If the defective door played any part in causing injury to this plaintiff and the jury can find that the defect was due to the negligence of the defendant, then they are liable. I think maybe you have enough to go to the jury on that score. I can't for the life of me see how a door that will open 20 inches creates an unsafe place to work.

Mr. Ruffalo: I think it does; Your Honor, in view of the fact they had large bags to stick through a narrow space and had to force them through.

Mr. Mercer: That wasn't the testimony he forced them through. He stated he put them up there on the edge and baggageman inside picked them up and took them away.

The Court: I heard twisting and reaching around to get the bag to put it up and that's when his back snapped.

[fol. 85] Mr. Ruffalo: He testified he had to shove them through, the larger ones. The smaller ones he just threw it in.

The Court: He didn't say when he was shoving them through that his back snapped. He said he turned to the right and lifted it up and that's when his back snapped. It had nothing to do with the door. You say he was shoving it through when his back snapped?

Mr. Ruffalo: Yes, as he was shoving it through and because he had to be in a turn position as he was shoving it through, that's when he felt his back snap.

The Court: He didn't have to be in a turn position. He could face the small opening and push.

Mr. Ruffalo: Yes, Your Honor, but the situation was from his position on the truck he had to turn and put it in the opening because as he picks up the bags he steps forward.

The Court: It's beyond me. I don't see any negligence in this case.

Mr. Wright: I don't want to intrude in the argument, Your Honor, but I made a note when Mr. Moffatt was on the stand. Mr. Moffatt testified that ordinarily the door is open. The baggage man will throw the bags in sideways, but in this case, the car door, being partially closed, he was shoving them in the only way he could do it. The only reason I mention that I think it bears out Mr. Ruffalo's contention.

Mr. Mercer: Nothing other than what was normal practice.

[fol. 86] Mr. Wright: It isn't normal to have a door you can't open, Mr. Mercer. The railroad must assume that through this door this baggage has to be thrown and taken out.

The Court: I will go over my notes. Have you agreed?

Mr. Mercer: Nineteen years.

Mr. Ruffalo: Nineteen years.

The Court: All right, we will read that to the jury.

Don't you think you ought to take this case to the Court of Appeals so we know how to try it?

Mr. Ruffalo: I think, Your Honor, that we have the law that would support us on that, abundant law.

The Court: Do you have any case similar to this where there is a narrow door and somebody hurt his back while pushing something through the door and does some court call such a situation an unsafe place to work?

Mr. Ruffalo: The only case that I can cite among my notes here at this particular time is the one where they said the railroad's failure to make reasonably careful inspection before loading to determine whether a car could be unloaded without danger to employee constituted actionable negligence was a question of fact for the jury.

The Court: What case is that?

Mr. Ruffalo: 151 Atlantic 122.

[fol. 87] The Court: Atlantic. Don't you have a federal case on it?

Mr. Ruffalo: Chojinski vs. New York Central Railroad Company.

The Court: 151 Atlantic, not Atlantic Second.

Mr. Ruffalo: I think that is Atlantic.

The Court: An old case. I will look at it. I presume you have here your best.

(Recess taken.)

The Court: Are you prepared on your exhibit?

Mr. Ruffalo: I just want to stipulate, Your Honor, that it's been stipulated between the counsel for the plaintiff and the defendant that a man 53 years of age under the mortality tables of the Commissioners, 1941 standard ordinary mortality tables, would have a life expectancy of 19 years.

The Court: As I understand, you rest your case with the privilege of reading in some hospital records that are yet to come?

Mr. Ruffalo: That's right, Your Honor.

The Court: All right, plaintiff rests.

RULING ON MOTION FOR DIRECTED VERDICT, ETC.

The defendant P & L E Railroad's motion for a directed verdict on the grounds that there is no diversity of citizenship between the plaintiff and the P & L E Railroad is granted.

However, we will not rule on the motion for a directed verdict with respect to the dual employment angle until the end of the defendant's case at which time he will have [fol. 88] the right to renew the motion for a directed verdict. That is, the P & L E will have the right to renew its motion for a directed verdict, on the grounds that the plaintiff was not an employee of the P & L E Railroad. I think we better wait until we hear all the testimony before we rule on that.

Now, as indicated in chambers at ten o'clock this morning, counsel shall prepare a stipulation in accordance with the facts and submit it to me at about quarter of two. Is that agreed? So we will give you time to prepare that and we will rule on the other motions at two o'clock. You are recessed until two o'clock, ladies and gentlemen. Jury may retire.

(Jury retires.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Ruffalo, that case at 151 Atlantic, 122, being the case of the Supreme Court of New Jersey, does not even mention an unsafe place to work and the facts are so obviously different from this case that I can't consider it any authority at all.

Mr. Ruffalo: There's been some difficulty in finding one exactly on point, Your Honor.

The Court: You never find one exactly on point, but that case is so far removed from this case that I am not even going to analyze it. I am surprised you'd even mention it to me. The opinion doesn't even mention an unsafe place to work, just pure negligence on the part of the railroad for having some stick in the bottom of the car covered by grain. That was just outright negligence. It didn't say anything about it being an unsafe place.

Mr. Ruffalo: I noted it under several cases I had noted here as being one in which as regards to loading purposes [fol. 89] and unloading as to the effect, failure to use reasonable care and inspection in regards to inspection and that was the purpose of noting it, that they have a duty, that the railroad has a duty to use reasonable care to make an inspection in regards to the conditions in cars.

The Court: That's right, if they fail to discover a defective condition. That's not in this case. The baggage man alleges, he said I have asked them a number of times to fix the door and they wouldn't fix it. So they were on notice to fix it. The defect in the door, if due to the negligence of the defendants is actionable, providing it caused the injury. Now, how in the world did that defective door cause the injury?

Mr. Ruffalo: I say it caused the injury in view of the fact that it wasn't open. You couldn't open it wide enough to permit, readily and accessibly, putting the baggage into the baggage car.

The Court: He put a number of bags in without any difficulty.

Mr. Ruffalo: The smaller ones, yes, but the larger ones would not go through because of the size and bulk of the particular large bags and he had to use force and an unusual amount of strength in order to push those through where he didn't have to do that in the other ones.

The Court: You say it was while he was pushing that he got this snap in the back?

Mr. Ruffalo: Well, he got the snap in the back. I mean, it's just the same thing as a man carrying a tie or a man [fol. 90] carrying a pipe, where one man, they don't give him sufficient help in order to carry a tie and he injures his back or one man lets go of it suddenly and drops it and an injury results in that manner or the weight shifts in his arms suddenly or something like that and he's caught with an unexpected amount of weight in his hands and it causes injury to him.

The Court: There wasn't anything sudden about this. He could see it. He saw it all during the performance of loading the smaller bags, as you say.

Mr. Ruffalo: Yes, but it was something he had to do and he had to do in a certain amount of time. He had to do it hurriedly and quickly and he was instructed to do it in order to do it by his superiors and he had no other choice but to do it that way. He had no one else there to help him. He couldn't call anybody, he couldn't ask anybody. He had to go ahead and do it the best possible way he could.

The Court: Suppose he had called somebody and someone else helped him push the bag through the door and he snapped his back. You say there could be no liability?

Mr. Ruffalo: No, I don't think so. He didn't have anybody to help him pick up the bags or to have anyone help him handle one end of these, in order to maybe lighten the load and maybe work the thing through the opening in such a manner that he could have gotten it in there without having to use the amount of force he had to use. I mean, in the light as I have cited before, in the light of the Rogers [fol. 91] vs. Missouri case, which the Supreme Court has said that we do not follow the common law principles of negligence, we apply the negligence as we see it here and that in view of the fact that there is no federal workmen's compensation act, that we are permitting these things to go to the jury for a question of fact for the jury to decide. The Supreme Court has handed down the Tiller case, the Lilly case, the Blair case, the Baily and numerous others, that if there is the slightest doubt in the mind that the

case should go to the jury. If it's just even the slightest amount of doubt, that the case should go to the jury.

The Court: Suppose I don't have any doubt?

Mr. Ruffalo: Well, I don't know. I think you do, Your Honor, in view of the fact you say if the door is defective, then that's a different thing, that the door wouldn't open because it's defective. I think that shows that there is some doubt in your mind as to just exactly what did take place and where the negligence lies and what the situation was there at that time.

The Court: But how can the jury with reason find that that defective door caused him to hurt his back?

Mr. Ruffalo: I think they can with reason, such as they could find in many of these other cases that the courts have held that man was hurt in similar type of cases where there was too much—where the man lifted a tie that was too heavy for him or where a man was told to carry a pipe and he hurt himself.

[fol. 92] The Court: It's very easy to see how lifting a heavy tie hurt him. Very easy to see that. But the door, he never touched the door.

Mr. Ruffalo: Well he himself, no, but the baggage would itself, I mean touch the door and come in contact with the sides of the door and the sides of the car, so that you would be trying to push an object through a space that was too small for it to go through and in order to do the job and get it on there, he used the force to shove it in, brute force to go in there and in that manner he got hurt. I think it's very reasonable and it's very plausible that such a thing can happen. I think a jury can very reasonably see it.

The Court: As you now state it, it's all right. It certainly was confusing where it was an unsafe place to work. I can't see anything unsafe about it. It was just a plain defective door that caused him, that played some part in causing the injury. I can see that. When you put it on an unsafe place to work, you got me clear out into left field.

Mr. Ruffalo: It may be my fault in misleading Your Honor. That's how I interpreted it. I may have interpreted it in the wrong light.

The Court: Maybe you're right, but I just can't see that. Maybe you are right.

Mr. Mercer: Even the Rogers case demands some negligence. I don't think there is in evidence in this case at all which even points by a scintilla that the door had the slightest thing to do with any injury here. The plaintiff, Michael Shenker, testified he picked these bags up and put [fol. 93] them through the opening. The bigger ones he just pushed over. There is no testimony that there was any contact of a bag with the side of the door, the side of the train. There is no testimony that any bag caught in the door. There's no testimony that this door had anything to do with any alleged injury. I fail to see even a scintilla of anything here.

The Court: We will see if the jury can see it.

The B & O Railroad can't delegate its duty to provide cars without defective doors to the P & L E and if it was a defective door and the jury so finds, and they find it was due to the negligence of the P & L E, the B & O Railroad is liable. Can't delegate its duty to its employees on some other railroad which they are required to service.

Mr. Mercer: What duty did we violate?

The Court: Failure to have a door that would open.

Mr. Mercer: What did that have to do with the accident? Shenker hasn't said it.

The Court: It's hard for me to see. Maybe the jury can see it.

Mr. Mercer: Shenker certainly hasn't said anything like that. This is purely in the realm of speculation. If ever a defendant or defendants should walk out of a courtroom free, this is one.

Mr. Wright: Doesn't the act say that the action or non-action of the defendant is causing in whole or in part the accident?

[fol. 94] Mr. Mercer: Yes, but you have to prove something about it.

Mr. Wright: All right, the normal loading, you stand, I have thrown these mail sacks around myself. I used to have a job like that. You bend down, you throw them in the car. You have plenty of room to throw them. Here you have a narrow restricted place. He goes through tortuous motion. He goes over to the door, shoves them through, gets out of the way of the door, so he can shove

another one in. The twisting and shoving is an unnatural motion for the job and he experienced a bad back. He may have been able to do it for two weeks and not have kinked his back in exactly the same way as to cause him to get a ruptured disc. He did get hurt, Your Honor.

The Court: Your own doctor proved you can get that by sneezing or coughing. Surely you are not going to make the railroad pay for that.

Mr. Wright: No, I wouldn't say that. One of the elements it certainly can't be charged by defendant that this man is faking an accident when their own doctor removed a disc.

The Court: Oh no, he's hurt.

Mr. Wright: I admit we have to go further than that. We have to show some causal connection. But we only have to show it in whole or in part. If that narrow constricted doorway contributed in part to the accident, I think under all the cases, I have seen a lot weaker cases than this go to the jury. The tendency is to allow the slightest evidence of negligence go to the jury, as Mr. Ruffalo said.

[fol. 95] The Court: I agree with it, even when I can't see it. I can see the defective door if the evidence as counsel for plaintiff mentioned is in the case, that that might be found with reason to have played some part, some slight part in causing this back, if the jury wants to believe it.

Mr. Wright: You know, I am like Your Honor. I have been trained in the common law. When I first came down here several years ago on these F.E.L.A. cases, they astounded me. When I read the decisions, I am gradually adjusting my ideas to a different logic in the application of the rule of negligence in the Federal Courts and even the state courts in F.E.L.A., in Jones Act cases than I had been taught to follow all my life. The adjustment is rather difficult. If the adjustment has been made by the courts, we are entitled to it, the same as other plaintiffs.

The Court: Well, too often I see a railroad worker getting hurt where the railroad is not negligent in the slightest degree and he searches around for something on which he can tag it with negligence and I just had one last week where the jury just wouldn't agree on it. It was so obvious

he was hurt on the railroad performing some duty that wasn't negligence on the part of the railroad at all, and they won't agree on that.

Everybody knows that swinging mail into a baggage car can hurt a lot of people's backs. If that's what happened, there wouldn't be any liability on the railroad. I think there ought to be but there isn't under the law. It's not a compensation act.

[fol. 96] Mr. Wright: Sort of halfway between, according to the courts. It seems to be sort of halfway between the common law liability and a non-faulty liability. I find it pretty hard to get the line of demarcation.

The Court: There must be negligence. There must be some evidence of negligence, but it doesn't have to be very much.

Mr. Mercer: I hope you will rule with me, but still I would like maybe a little extra time at noon because I have Dr. Thurston Adams in town from Baltimore, at which time in accordance with our agreement with plaintiff's counsel, we'd like him to examine the plaintiff.

Afternoon Session, 2:00 p.m.

READING OF STIPULATION TO BE SUBSTITUTED
FOR A PREVIOUS ONE

The Court: Ladies and gentlemen, when the trial opened, as you recall, Mr. Ruffalo for the plaintiff read you a stipulation. The stipulation I thought was inconsistent with the testimony so I requested counsel to agree on another stipulation to be substituted for the fourth stipulation.

4. It is hereby stipulated that the Pittsburgh & Lake Erie Railroad Company had one westbound track and one eastbound track with a platform and waiting room at Mahoningtown, New Castle, Pa. B & O Railroad had one westbound track and one eastbound track with a platform and passenger station which station was north of the B & O tracks. No P & L E trains came over the B & O tracks. However, B & O employees would service P & L E trains [fol. 97] stopping at Mahoningtown, New Castle, Pa., and

running on P & L E tracks. The baggage carts or trucks were owned by the B & O Railroad and the employees operating the baggage cart or trucks were paid by the B & O Railroad. The ticket agent at the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets.

Now, the only thing that's confusing to me, gentlemen, is Mahoningtown, New Castle. I thought New Castle was a city.

Mr. Ruffalo: That is, Your Honor. Mahoningtown is just a section of it, like you might have the Squirrel Hill section of Pittsburgh.

The Court: When you speak of Mahoningtown, New Castle, that's a station in New Castle at a place called Mahoningtown, is that correct?

Mr. Ruffalo: Yes.

RULING ON MOTION FOR DIRECTED VERDICT, ETC.

The Court: All right, it's clearer now than it was.

The defendant's motion on behalf of the B & O Railroad for a directed verdict is denied. Defendant's motion in behalf of the P & L E for a directed verdict is denied, except as heretofore granted with respect to the common law action based on diversity of citizenship which was granted. All right, proceed with the defendant's opening address.

[fol. 98]

Defendant's Case

EDWARD WILLIAM BECK, a witness in behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Mercer:

Q. What is your full name?

A. Edward William Beck.

Q. Where do you live?

A. 948 Cadwell Avenue, Elmhurst, Illinois.

Q. Elmhurst, Illinois?

A. That's right.

Q. How long have you been living there?

A. Oh, about five months.

Q. Are you married?

A. Yes, I am.

Q. Any children?

A. Two.

Q. Are you employed today?

A. Yes, I am.

[fol. 99] Q. For whom do you work?

A. I work for Standard Oil Company of Indiana.

Q. How long have you worked for the Standard Oil Company of Indiana.

A. About three months.

Q. Back in October of 1956, by whom were you employed?

A. Pittsburgh & Lake Erie Railroad Company.

Q. In what capacity?

A. Well, I was in passenger service as a baggage man, a flag man and a brakeman.

Q. On the night of October 14th, were you working?

A. Yes, I was.

Q. Where?

A. Train 79 as a baggage man.

Q. Train 79?

A. Yes, sir.

Q. What time did that train—where did it originate?

A. It originated in Pittsburgh.

Q. What was its destination?

A. Youngstown, Ohio.

Q. What time did it leave Pittsburgh?

A. That I couldn't say right offhand.

Q. What time was it supposed to hit New Castle?

A. Well, around 12:30 in the morning.

Q. Were you working in the baggage car that night?

A. Yes, I was.

Q. Had you worked that shift or that run prior?

A. Yes, I did.

Q. How long prior?

A. Oh about a year or so.

Q. Were you working that same truck?

A. No, I was working off the extra board.

[fol. 100] Q. Had you been working Train 79 before?

A. Yes, sir.

Q. And did you work Train 79 after October 15, 1956?

A. Yes, I did.

Q. How many doors does a baggage car have?

A. It's got four doors.

Q. Tell us what they are.

A. Well, there's two doors on each side of the car.

Q. On each side of the car?

A. Yes, there is.

Q. How many doors did the baggage car on Train 79, October 15, 1956, have?

A. It had the same amount, four door.

Q. Was this a regular baggage car?

A. It was a regular baggage car, assigned to that regular run.

Q. When you came into New Castle station or Mahoningtown station, as we have been calling it, do you recall whether there was anything the matter with a door?

A. No, I don't.

Q. Do you recall having talked to Michael Shenker that this door was defective?

A. No, I don't recall whether I said anything about the door.

Q. Do you recall having told him that this had been reported?

A. No.

Q. Did the door work all right, to your knowledge?

A. It did.

Q. Cross-examine.

[fol. 101] Cross examination.

By Mr. Ruffalo:

Q. On this evening when you stopped at New Castle in order to load the baggage onto the baggage car, did you have the door fully open?

A. To my knowledge, I had it fully open.

Q. Well, do you know or don't you know whether or not it was fully open?

A. Well, that's a pretty long time ago. You are going back five years now.

Q. That was about five years ago?

A. It was pretty close to it.

Q. When did you first learn that this thing was coming up, this case was coming up?

A. This case, oh, let's see. I was contacted sometime last year that the two railroads were being sued. Now the first time.

Q. That was the first time?

A. That's the first time.

Q. And a period of about three years had gone by then?

A. Pretty close to that, yes.

Q. You had no particular reason to remember the date of October 15th, 1956?

A. Well, actually, no.

Q. So you wouldn't be able to say definitely whether the door was fully open on October 15, 1956 or not, would you?

A. No, I couldn't.

Q. That's all,

[fol. 102] Redirect examination.

By Mr. Mercer:

Q. During your entire run, as many runs as you made on 79, did you ever have a bad door?

A. No.

Q. That's all.

Mr. Mercer: Mr. Moffatt, could I recall you, please?

RICHARD H. MOFFATT, a witness in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Mercer:

Q. You have been up there once, so you don't have to be sworn.

The Court: You are still under oath, Mr. Moffatt.

Q. I wanted to ask you where you were standing on the platform of New Castle station while Mr. Shenker was loading?

A. Right alongside of the truck where they was loading the mail.

Q. If we take, for example, this table here, as the baggage cart or baggage truck and that the jury box is the baggage car, is that correct?

A. That's right.

Q. Where were you standing?

A. I was standing right about where you would be.

[fol. 103] Q. Right here?

A. Alongside the cart.

Q. You told me this morning that this baggage cart had about one-third of it with sacks of mail?

A. That's right.

Q. And the door was open, I believe you stated, 20 to 24 inches?

A. That's right.

Q. And where would that be?

A. That would be on the lower end of the cart.

Q. Down here?

A. In what we call the back of the truck.

Q. Back of it?

A. Yes, sir.

Q. Where was the mail?

A. Mail would be on the front end.

Q. On the front end?

A. Yes, sir.

Q. So Mr. Shenker would be standing in here?

A. That's right.

Q. The mail would be up here?

A. That's right.

Q. And the door opening would be back where he was standing?

A. Right in front of him, yes.

Q. Is that correct?

A. Yes, sir.

Q. Could you describe for me, first let me ask you; you watched him put this mail or these sacks on the train, did you not?

A. Yes, sir.

Q. Did you ever see anything blocking the doorway of that train?

[fol. 104] A. No, sir.

Q. Could you describe for this jury what you saw Shenker do while he was on this baggage cart? Do you want to come down here?

A. (Witness leaves stand.) Standing here I'd be standing up close to the cart. The mail would be up here. The door would be up in here. He would be going like this (indicating). On smaller pieces he'd toss them in like that. On large pieces, he would pick them up, stand them up and hold them over. As soon as one would be thrown in there, the baggage man would pull them away so there wouldn't be nothing to obstruct the next one from being pushed in.

Q. That's what you saw him do, the whole thing?

A. Yes, sir.

Q. Is that normal procedure?

A. Yes, sir. (Witness resumed stand.)

Q. I have no other questions.

Cross examination.

By Mr. Ruffalo:

Q. Mr. Moffatt, do you recall signing a statement for me the other day in which you said in this statement that the door was open about 20 inches?

A. Yes, sir.

Q. Would you say it was normal to only have the door of the baggage car open 20 inches?

A. I wouldn't say that it was normal. I'd say it was normal to throw the baggage in the way he was throwing it in.

Q. But it wasn't normal to have the door just open 20 inches?

A. That's right.

[fol. 105] Q. How long was this baggage car, do you have any idea?

A. Oh, I'd say ten feet.

Q. About ten feet?

A. That's right.

Q. So the door was open here about 20 inches?

A. That's right.

Q. The rear end of the baggage truck?

A. That's right.

Q. And I believe you testified that the baggage was piled in the front of the baggage truck, is that right?

A. That's right.

Q. About one-third of the distance?

A. Yes, sir.

Q. So that we'd have the front of the baggage truck would be about here and you'd have about three feet of that where there would be, the baggage piled up front, is that right?

A. Yes, sir, that's right.

Q. And you say that Mr. Shenker stood back here and went like this (indicating) and then put the baggage in?

A. You are making a pretty big long truck.

Q. What?

A. You are making a pretty big long truck there. It isn't quite as long as you—

Q. It's about three feet here.

A. It isn't so long as that desk there.

Q. I think the evidence is here from the interrogatories that it's 119 inches. Ten feet would be 120 inches, isn't that right?

A. That's right.

[fol. 106] Q. So there's about three of my steps, and one of my shoes. My foot is about a foot long?

A. That's right.

Q. Another foot would bring it down here. This would be the front of the truck?

A. But you don't stand clear back, as far as you possibly can stand when you're throwing in. You stand the best place you can get, and handle the mail wherever he's loading.

Q. You stand here some place in the middle of it then and push it through the 20 inch opening from here?

A. Any place at all that you need. Your truck is supposed to be spotted where the truck is being loaded.

Q. What?

A. Your truck is supposed to be spotted where you are going to load. If you need it up or down or anything like that.

Q. You said it was spotted so that the rear of the truck was opposite the door, the 20 inches?

A. No, I said where he was standing was opposite the door.

Q. I believe you just testified for Mr. Mercer here, that the rear, he was standing at the rear of the truck and the rear of the truck was opposite the opening of the door?

A. Not the rear of the truck. Where he was standing would be opposite where the door was. The rear of the truck would be back even with the—

Q. The rear of the truck was now back even?

A. With the door, that's right.

Q. With the door?

A. Now, don't forget. What are you talking about, the baggage door or the door opening? There's an outline that [fol. 107] I call the door. There's a door here that's opening. The outline here is where the baggage truck is back here. There's another baggage door in here. He's standing in between here.

Q. He's standing in between there?

A. That's right.

Q. Whereabouts is he standing? Is he standing in the center here of the baggage truck now?

A. Standing not in the center of the baggage truck. He's standing back on the lower end of the baggage truck immediately in front of where the door was open.

Q. He's standing back at the lower end of the baggage truck, immediately in front of the door opening? Is that right?

A. All right.

Q. So isn't that substantially what we are talking about?

A. That's all right.

Q. Then the front of the baggage truck is up here?

A. All right. Three foot of mail on it.

Q. With three foot of mail on it! So we step up about three feet. We've got the mail piled up in here. He's standing back here, is that right?

A. That's right.

Q. I believe you said you saw nothing blocking the doorway of the train?

A. That's right.

Q. You mean the 20 inch opening, you saw nothing in the 20 inch opening?

A. That's right.

Q. But you don't know whether the baggage was piled up against the door of the baggage car on the inside?

A. It could have been.

[fol. 108] Q. It could have been?

A. That's right.

Q. That's all.

Redirect examination.

By Mr. Mercer:

Q. That would be beyond the opening, wouldn't it?

A. That's right, where I couldn't see.

Q. That's all.

By the Court:

Q. Mr. Moffatt, while you were standing there alongside the cart watching this operation, did you see Mr. Shenker, the plaintiff, push the door?

A. No.

Q. Open it further?

A. When I come in off the train, again I got up to where the baggage truck was, the door was already open. Whatever they done to it, I don't know anything about it.

Q. When you were there, did you see the plaintiff Shenker push the door open further?

A. No, sir.

Q. Did you see the baggage man push the door open further?

A. No, sir.

Q. Did you overhear a conversation between them, between Shenker and the baggage man?

A. No, sir.

Q. Do you recall of them talking together while you were there?

A. No, I don't, unless the ordinary chit-chat or something like that.

[fol. 109] HARRY LEWIS BANKS, a witness in behalf of the defendant, having been previously sworn, testified as follows:

The Court: Mr. Banks recalled by the defendant. You are still under oath.

A. Yes, sir.

Direct examination.

By Mr. Mercer:

Q. Mr. Banks, I believe you stated that you were in charge of this station?

A. I did.

Q. On this particular trick?

A. That's right.

Q. And that Shenker would be underneath you.

A. That would be true.

Q. He'd be responsible to you?

A. Right.

• • • • •

[fol. 112]

LING ON MOTION FOR DIRECTED VERDICT, ETC.

The Court: Now, I have a motion by the Pittsburgh & Lake Erie Railroad Company, defendant, for a directed verdict, for the reason set forth that the plaintiff failed to prove negligence. Although it was doubtful in my mind, I think I will adhere to my former ruling and refuse the motion on that ground.

Plaintiff is guilty of contributory negligence. What evidence do you have that the plaintiff—

Mr. Mercer: That, of course, Your Honor, would be excluded since there's no diversity of citizenship here. I believe that common law action went out anyhow, did it not?

The Court: Yes, the common law action went out but the allegation that the contention that this plaintiff was employed by the P & L E is still in. If he's an employee of the P & L E he can recover a verdict against them. The question is, is he an employee and you haven't mentioned [fol. 113] that in your directed verdict. I don't know whether there's any proof that he is an employee or not.

Motion by the B & O Railroad for a directed verdict, failure to prove negligence. You mentioned contributory negligence. Motion of the B & O Railroad for a directed verdict is refused. What evidence do you have of contributory negligence?

Mr. Mercer: I don't even think there's any evidence of negligence here.

The Court: I know, but how about contributory negligence? Assume there is enough evidence of negligence. What proof is there of contributory negligence?

Mr. Mercer: About the only proof would be here, Your Honor, his statement as to how he picked these things up and that would be a question for the jury, whether or not it was negligent on his part to put the bags like there were on this cart into that kind of a narrow opening.

The Court: All right. Maybe it's in.

Mr. Mercer: That would be the question of fact for the jury.

The Court: Well, I don't know what to do here. You haven't raised the vital question in the case here, if the P & L E is in the case, that this plaintiff is an employee of the P & L E, as well as an employee of the B & O Railroad. Now, I don't know where we are on that. You haven't mentioned that as a ground for a motion.

[fol. 114] Mr. Mercer: I will have a supplemental motion. I didn't know we were going to finish so fast this afternoon.

The Court: What proof is there?

Mr. Mercer: There isn't any.

The Court: What proof do you have that this plaintiff is an employee of the P & L E Railroad, and therefore is

entitled to recover from that railroad under the Federal Employer's Liability Act?

Mr. Ruffalo: In view of the fact he did the janitorial work in the P & L E station and that he serviced these various trains with baggage and with mail.

The Court: Do you think that's enough?

Mr. Ruffalo: I would think that would put him under their employment.

The Court: Suppose I hired you to clean out my cellar which very badly needs it and you hired Mr. Wright to do the work. Wright comes and cleans out my cellar. Is he my employee? He is working on my house.

Mr. Ruffalo: I would be an independent contractor. If I hired Mr. Wright, of course he would be my employee. But this is a situation where you have a servant, it's almost like in these longer—

The Court: Who hired him?

Mr. Ruffalo: The B & O hired him.

The Court: I think you have to hire a servant, have proof that he was loaned to you. Somebody loans me a [fol. 115] servant, I pay that servant, don't I? There's no proof here that he was loaned to anyone. He just worked over there at the direction of the B & O bosses.

Mr. Ruffalo: It's admitted in the evidence that there was a contract existing between the P & L E and the B & O Railroad that they should be able to use their facilities and their employees.

The Court: It says nothing about loaning servant or employees.

Mr. Ruffalo: No, but there is compensation for the use of it.

The Court: We don't know that. The contract—

Mr. Ruffalo: I think the contract would imply the fact that they didn't get it for nothing.

The Court: Oh no, the contract isn't in evidence. Maybe it's purely a gratuitous agreement. What evidence is there that there was a contract anyway?

Mr. Ruffalo: They said there was a contract existing between the B & O and the P & L E Railroad.

The Court: Where is that?

Mr. Ruffalo: That was in the first stipulation, and it also appears in the answer of—

The Court: Let me see.

Mr. Ruffalo: Of the Baltimore & Ohio and the answer of the P & L E. I am quite certain.

[fol. 116] The Court: That hasn't been admitted in evidence.

Mr. Mercer: None of that. P & L E did not have the right to hire and fire and did not have control over Michael Shenker.

The Court: I am asking where he had evidence where Shenker was loaned to the P & L E Railroad.

Mr. Ruffalo: I don't have evidence that he was loaned. There is evidence there was a contract between the B & O and the P & L E.

The Court: Let me hear that. Refer me to that.

Mr. Ruffalo: That was in Stipulation 4, which was read.

Mr. Mercer: Oh no.

The Court: Stipulation 4 says nothing about it. Here it is, the one you prepared at noon today.

Mr. Ruffalo: I mean the original stipulation.

The Court: That is out of the case. This was substituted for it, because that was so inconsistent with the testimony that it is stricken out. I asked you today to substitute one according to the facts. This is what I got. I told the jury that the one that you read at the beginning of the case was inconsistent and I asked you to prepare a new one in accordance with the facts and this is the one I got. The original one is out of the case.

[fol. 117] Mr. Ruffalo: Well, I understand. I thought that the original idea is that the contract was still in the case.

The Court: The fourth stipulation is out of the case and this is what came up as your substitute. I asked you to put down exactly—

Mr. Ruffalo: Only to explain the situation that existed there at the station, but it didn't change the terms of the contract or the contract relation of the parties.

The Court: We have no contract in evidence. All we know is that the B & O Railroad was servicing the P & L E trains by their baggage man.

Mr. Ruffalo: I would like to further amend that No. 4 and include the contract stipulation in it that was in No. 4 originally, Your Honor.

The Court: Well, it read Pittsburgh & Lake Erie Railroad Company, the other defendant, was authorized by contract with the Baltimore & Ohio Railroad to use the facilities at the station at New Castle, Pa., for the taking on and discharging of passengers and the loading and unloading of baggage and mail. That stipulation was entirely incomprehensible to me under the facts as testified by your witnesses and that's why I asked you to revise it.

The Pittsburgh & Lake Erie Railroad Company was authorized by contract with the Baltimore & Ohio Railroad to use the facilities of the station. What station?

[fol. 118] Mr. Ruffalo: The B & O station.

The Court: They didn't use it at all under the facts of this case. They were using their own station. They did sell their tickets over there, if that's what you meant and that's still in the case. That's what you meant by authorized by contract. It's still in the case.

You have agreed in your substituted 4 that the ticket agent of the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets.

Mr. Ruffalo: But there's no express stipulation in there that there was a contract arrangement for use of these facilities.

The Court: Facilities where?

Mr. Ruffalo: At the B & O Station.

The Court: There's no evidence in this case that the P & L E used any facilities of the B & O station except that the ticket agent sold some tickets.

Mr. Ruffalo: The ticket agent can use—

The Court: It has no bearing on this case.

Mr. Ruffalo: They used their employees and the baggage truck also.

The Court: You mean to say that the P & L E was authorized by contract with the Baltimore & Ohio Railroad to use the facilities at the station at New Castle of taking on and discharging passengers and loading and unloading [fol. 119] of baggage and mail? I asked you once at what station, you said the B & O Station. There's no such proof in this case. The P & L E didn't use the facilities of the B & O station at New Castle under a contract for the taking on and discharging of passengers and loading and unload-

ing baggage and mail. They used their own station. That's what I have been complaining about ever since the case started.

Mr. Ruffalo: They used the baggage—

The Court: The stipulation just doesn't prove it.

Mr. Ruffalo: They used the baggage trucks of the B & O, and they used their employees and they used the shed over there of the B & O station in which they would house these trucks and bring the mail into there and where the mail truck would back up to that particular shed there and door, and they would load the mail on to the mail truck when it came there. That was the only way they have of getting the mail, the Pittsburgh & Lake Erie on to the mail truck.

The Court: Motion of the Pittsburgh & Lake Erie Railroad for a directed verdict is granted, there being no proof in this case that I can see that a jury could possibly find that the P & L E employed the plaintiff as an employee. Therefore, we will go to the jury on the case of Michael Shenker against the Baltimore & Ohio Railroad alone.

(Adjournment taken until Wednesday morning, April 19, 1961.)

[fol. 120]

Morning Session

Wednesday, April 19, 1961

The Court: Let the record show that the defendant Pittsburgh & Lake Erie Railroad Company, defendant, has filed another motion for a directed verdict, setting forth an additional ground. The motion is granted as it was yesterday.

Are you ready to go to the jury?

Mr. Mercer: Yes, Your Honor.

(Mr. Mercer closed to the jury.)

(Mr. Ruffalo closed to the jury.)

IN UNITED STATES DISTRICT COURT

MOTION BY THE BALTIMORE AND OHIO RAILROAD COMPANY,
DEFENDANT, FOR DIRECTED VERDICT—April 18, 1961

And Now, April 18, 1961, defendant, The Baltimore and Ohio Railroad Company, by its attorneys, H. Fred Mercer, and Mercer & Buckley, respectfully moves the Court to direct a verdict in its favor for the reason that the plaintiff has failed to prove any negligence on its part or on the part of its servants, agents or employees, which was the proximate cause in whole or in part of his alleged injury.

Mercer & Buckley, H. Fred Mercer, Attorneys for
Defendant, The Baltimore and Ohio Railroad
Company.

[fol. 121]

IN UNITED STATES DISTRICT COURT

MOTION BY THE BALTIMORE AND OHIO RAILROAD COMPANY,
DEFENDANT, FOR JUDGMENT N.O.V.—April 20, 1961

And Now, April 20, 1961, defendant, The Baltimore and Ohio Railroad Company, having presented a motion for binding instructions in its favor, under Civil Procedure Rule No. 50, which was not granted, now moves the Court to set aside the verdict and judgment against it, and grant a judgment in its favor in accordance with its Motion for Directed Verdict.

Mercer & Buckley, H. Fred Mercer, Attorneys for
Defendant, The Baltimore and Ohio Railroad
Company.

[fol. 122]

IN UNITED STATES DISTRICT COURT

VII.

OPINION AND ORDER—August 8, 1961

Marsh, District Judge.

In this F.E.L.A. case, there was evidence from which the jury could have found the following facts: On October 15, 1956, the 49-year-old plaintiff was employed by the defendant, Baltimore and Ohio Railroad Company (B. & O.) as a baggageman, his duties, inter alia, being to assist in loading and unloading mail cars at the passenger stations of defendants, B. & O. and The Pittsburgh & Lake Erie Railroad Company (P. & L. E.), at their Mahoningtown, New Castle stations. Tracks of the P. & L. E. and tracks of the B. & O. were located between the two stations. In order to service P. & L. E. mail cars, plaintiff had to leave the B. & O. station, cross the B. & O. and P. & L. E. tracks, and go upon the platform of the P. & L. E. station. The P. & L. E. station was unmanned. The B. & O. ticket agent sold tickets to P. & L. E. passengers; plaintiff was paid by B. & O. and was subject exclusively to that company's orders and directions.¹

Early in the morning, plaintiff pulled his wagon or cart onto the P. & L. E. platform, stopped it in front of the doorway of the mail car on a P. & L. E. train, and pro-[fol. 123] ceeded to pick up the mail bags on his wagon and swing some of them through the opening of the mail car door where the P. & L. E. baggageman, Beck, received them.

On this occasion the sliding door on the P. & L. E. car would not open its full width but would open only 18 to 20

¹ The defendant P. & L. E. was granted a directed verdict because the plaintiff did not allege or prove that he was an employee of the P. & L. E., cf. *Hull v. Phila. & Reading Ry. Co.*, 252 U.S. 475, and because they were both citizens of Pennsylvania. *Jacobson v. N. Y., N. H. & H. R. Co.*, 347 U.S. 909 (1954), affg. 206 F. 2d 153; *DiFrischia v. New York Central R. Co.*, 279 F. 2d 141, 143 (3d Cir. 1960).

inches. When plaintiff swung a mail sack weighing 80 to 100 pounds into the narrow opening, the width of this sack prevented it from going through the opening, and he had to exert considerable extra force to push it through the narrow opening into the car. In so doing, he twisted his body and felt a snap in his back. He reported the injury promptly to the B. & O. On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy. This injury resulted in a permanent disability.

The defendant, B. & O., moved for a directed verdict which was denied. The jury found a verdict in favor of plaintiff in the sum of \$40,000. Defendant now moves for judgment notwithstanding the verdict.

It was the duty of defendant employer to use reasonable and ordinary care to provide plaintiff, its employee, with reasonably safe cars, appliances, and equipment in connection with his work. A failure to do so is negligence. This duty is a continuing and nondelegable one. The fact that the car was owned by and located on the tracks of another railroad does not absolve the defendant employer from liability for the injuries its employee may sustain by reason of its failure to provide him with reasonably safe cars, appliances or equipment. Cf. *Kooker v. P. & L. E. R.R. Co.*, 258 F. 2d 876 (6th Cir. 1958); *Chicago Great Western Ry. Co. vs. Casura*, 234 F. 2d 441 (8th Cir. 1956); *Beattie v. Elgin J. and E. Ry. Co.*, 217 F. 2d 863 (7th Cir. 1954).

[fol. 124] The evidence, we think, was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause an injury to him; and that it was negligence to fail to eliminate the unsafe condition after notice thereof prior to the accident.

In addition, there was sufficient evidence from which the jury could find with reason that this unsafe condition contributed in whole or in part to the plaintiff's injury.

Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period

sufficiently long that defendant, B. & O., had constructive notice thereof. Plaintiff testified that, immediately prior to the accident and while he and Beck were trying unsuccessfully to open the door wider, he told Beck, the P. & L. E. Baggage man, that he ought to get the door fixed, and Beck replied that he had reported it for repair, but that the door had not been fixed. T., pp. 27, 28, 53.

"Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was charged with knowledge" of the condition created by the defective door "which in the exercise of reasonable care it could have ascertained." Notice of a condition rendered unsafe by a defective appliance will be imputed to the employer where it could have been discovered by reasonable inspection and by the exercise of reasonable care. *Beattie v. Elgin, J. and E. Ry. Co.*, supra, at p. 866;² see also, citations, supra. [fol. 125] The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L. E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law.

We agree with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability, and if it could, how the jury could find that an injury could reasonably be foreseen; however, those issues, as well as the other issues mentioned, were for the jury. *Lavender v. Kurn*, 327 U.S. 645; *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500; *Sano v. Pennsylvania R. Co.*, 282 F. 2d 936 (3d Cir. 1960); and cases cited supra.

An order will be entered denying the defendant's motion for judgment n.o.v.

² This case distinguishes *Kaminski v. Chicago River & Indiana R. Co.*, 200 F. 2d 1 (7th Cir.), and *Wetherbee v. Elgin, J. and E. Ry. Co.*, 191 F. 2d 302 (7th Cir.), relied upon by defendant.

IN UNITED STATES DISTRICT COURT**ORDER OF COURT—August 8, 1961**

And Now, to-wit, this 8th day of August, 1961, after argument and upon due consideration of the parties' briefs it is ordered, adjudged and decreed that The Baltimore and Ohio Railroad Company's "Motion for Judgment N.O.V." be and the same hereby is denied.

(signed) Rabe F. Marsh, United States District Judge.

[fol. 126]

IN UNITED STATES DISTRICT COURT**FINAL JUDGMENT**

Pursuant to Verdict and Order, judgment is hereby entered in favor of Michael Shenker, plaintiff, and against The Baltimore and Ohio Railroad Company, defendant, in the sum of Forty Thousand and no/100 (\$40,000.00) Dollars, together with costs.

James H. Wallace, Jr., Clerk.

[fol. 127]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,755

MICHAEL SHENKER,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation,
and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Appeal from the United States District Court for the
Western District of Pennsylvania.

Argued February 21, 1962

Before Goodrich, Kalodner and Ganey, Circuit Judges.

OPINION OF THE COURT—Filed April 11, 1962

By Goodrich, Circuit Judge.

The plaintiff recovered a judgment against the defendant, The Baltimore and Ohio Railroad (B&O), in a suit under the Federal Employers' Liability Act, 45 U.S.C.A. §§51-60: The incident which is the basis of the plaintiff's complaint took place in a railroad yard at New Castle, Pennsylvania, where the B&O and The Pittsburgh & Lake Erie Railroad Company (P&LE) have adjoining parallel tracks. Each railroad has its own waiting room in this railroad [fol. 128] yard, but only the B&O maintains a ticket office. Tickets for P&LE passengers are sold at the B&O ticket window in the B&O station on the B&O side of these tracks. The plaintiff was a B&O employee whose duties included wheeling a loaded mail truck across the B&O tracks to the

tracks of the P&LE, and loading the mail into a P&LE car. On the night in question plaintiff had brought his loaded truck to the door of the P&LE mail and baggage car. He claims that the door of this car stuck and that in endeavoring to force a large bag through the narrow opening of the car he wrenched his back and suffered the injuries complained of. Since the jury found in his favor his version of what happened must be taken to be accurate.

The court below was not completely happy with the verdict. See 196 F. Supp. 108 (W.D. Pa. 1961). He said that he agreed "with the defendant that it is difficult to understand how the jury could find that the narrow opening caused by the defective door created an unreasonable risk of harm on which to predicate liability" Nevertheless, being familiar with the decisions in this field, he did not interfere with the jury's verdict.

Our difficulty comes from one point which the court passed over rather lightly. He said:

"The employer's duty to inspect and to repair a defective appliance creating an unreasonably unsafe condition cannot be delegated. In the case at bar, it was for the P. & L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B. & O., as a matter of law."

Our trouble comes in seeing how the negligence of the P&LE, if any, in having a defective door, became attributable to the B&O as a matter of law. As the judge himself pointed out in addressing counsel during the trial of the case: "We have no contract in evidence. All we know is that the B&O Railroad was serving the P&LE trains by their baggage man." The car alleged to be defective be- [fol. 129] longed to P&LE. Nothing appears to show us that the B&O had any control whatever over the car or any employees of the P&LE. We do not know that the B&O became the agent of the P&LE, nor, indeed, as the trial court pointed out, anything more than that a B&O employee hauled the truck over to the P&LE tracks and put the bags in the car.

If the P&LE was the employer of the B&O in this kind of a transaction we do not see any basis for attributing the negligence of the employer to the employee who had no notice of the defect and who had no control over what its "principal" did. As is stated in comment *b* to section 350 of the Second Restatement of Agency:

"The knowledge of another agent or of the principal does not affect the liability of the agent. Thus, an agent who has no reason to know that the instrumentalities which he uses are not suitable for the work . . . is not liable for harm caused by reason of that fact."

The Supreme Court decision in *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326 (1958), is relied upon by the plaintiff. We think whatever impact that case has upon our situation tends to establish liability on the part of the P&LE and not the B&O.

The P&LE was initially joined in this suit. The judge dismissed the action against it on two grounds: (1) that no diversity of citizenship was shown; and (2) that there was no employee-employer relationship between the plaintiff, Shenker, and the P&LE.

To conclude: There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer.

The judgment of the district court will be reversed.

[fol. 130] KALODNER, Circuit Judge, dissenting

I would affirm the judgment of the District Court entered in favor of the plaintiff pursuant to the jury's verdict in his favor.

I agree with the District Court's holding, stated in its Opinion denying defendant's motion for judgment n.o.v., that "The evidence . . . was sufficient for the jury to find with reason that the defective door created an unreasonably unsafe condition for an employee whose duty was to swing heavy mail sacks from a cart into a mail car; that it was foreseeable that this condition might cause injury to him; and that it was negligence to fail to eliminate the

unsafe condition after notice thereof prior to the accident", and that "Furthermore, there was evidence from which the jury could find that the unsafe condition existed for a period sufficiently long that defendant, B. & O., had constructive notice thereof." 196 F. Supp. 108.

On this appeal defendant does not even contend that the trial judge in his charge to the jury failed to adequately instruct it with respect to the law relating to any of the aspects or elements of the negligence charged by plaintiff against defendant. The record discloses that not only did the defendant not except to the charge to the jury but that in response to the Court's question, addressed to trial counsel, "Gentlemen, have I misstated anything?" defendant's response was "No, Your Honor."

The majority premises its reversal of the District Court's denial of defendant's motion for judgment n.o.v. on its view that "There was not the slightest evidence of any actual want of care to its employees on the part of the B&O; and, second, we see no basis whatever for attributing any negligence on the part of the P&LE to the plaintiff's employer."

The sum of the majority's position is that the evidence failed to establish that defendant breached a duty to plaintiff. I disagree.

[fol. 131] The record discloses that the P&LE did not maintain any employees at its Newcastle station;¹ defendant's employees serviced P&LE trains operating on its tracks which stopped at its station;² and plaintiff was assigned by defendant to load and unload P&LE mail and baggage cars. It was during a mail loading operation that plaintiff was injured by reason of a defective door of a P&LE mail car. Evidence was adduced that P&LE had been earlier advised that the door was defective.

These principles are well settled: It is the duty of a railroad to use reasonable care to furnish its employees with a safe place to work;³ "... the standard of care must

¹ Plaintiff's Interrogatory No. 17 and defendant's Answer thereto.

² Paragraph 4, Stipulation at trial.

³ *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943); *Sano v. Pennsylvania Railroad Company*, 282 F.2d 936, 937 (3 Cir. 1960).

be commensurate to the dangers of the business";⁴ the fact that a railroad does not own, maintain or control the premises on which its employee is injured in the course of his employment does not relieve it of its legal duty to provide its employees with a safe place to work, nor does it absolve it from liability for injuries sustained by its employees because of unsafe condition of the premises.⁵

These instances of application of the principles stated are relevant here:

A railroad switchman was injured when the engine on which he was riding passed over a faulty section of track which broke causing him to be thrown to the ground. The track in question was neither owned nor maintained by the railroad which employed the switchman. The jury returned a verdict against the employing railroad. In affirming, the appellate court held that the absence of the elements of ownership or control of the premises on which the switchman was injured in the course of his employment did not [fol. 132] relieve the employing railroad of its legal duty to provide him with a safe place to work; that "the duty the law imposed upon the railroad to inspect the tracks over which it moves its trains imputes to it constructive knowledge of the unsafe condition." *Denver and Rio Grande Western Railroad Company v. Conley*, 293 F.2d 612, 613 (10 Cir. 1961):

A railroad switchman was injured in the course of performing his duties when struck by a defective gate on the property of a packing company which the railroad served. A jury verdict in favor of the injured employee against the employing railroad was affirmed even though it did not own or control the premises where the accident occurred. *Chicago Great Western Railway Company v. Casura*, 234 F.2d 441, 447 (8 Cir. 1956):

⁴ *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943).

⁵ *Denver and Rio Grande Western Railroad Company v. Conley*, 293 F.2d 612, 613 (10 Cir. 1961); *Chicago Great Western Railway Company v. Casura*, 234 F.2d 441, 447 (8 Cir. 1956); *Beattie v. Elgin, Joliet & Eastern Railway Co.*, 217 F.2d 863, 865 (7 Cir. 1955).

A railroad switchman was injured when in the course of performing duties assigned to him by his railroad employer he slipped on oil or grease on the steel platform of a coal dumper owned and maintained by the United States Steel Corporation on its property. A jury verdict in favor of the injured switchman against the railroad was affirmed on the appellate court's holding that the railroad's "knowledge, actual or constructive, of the allegedly dangerous condition of the place where the accident occurred was a question for the jury." *Beattie v. Elgin, Joliet and Eastern Railway Co.*, 217 F.2d 863, 867 (7 Cir. 1955).

In the instant case the majority directed its attention to the status—agency or otherwise—which obtained or didn't obtain between defendant and P&LE relating to the servicing by defendant of P&LE's facilities, i.e. mail car.

In my opinion the question of the status referred to is academic. Assuming *arguendo* that defendant acted as a volunteer Good Samaritan in giving neighborly aid to P&LE in servicing its mail cars and not as a result of some contractual arrangement, the duties imposed by law on defendant to provide plaintiff a safe place to work would not be affected, one way or the other.

[fol. 133] Principles of agency adverted to by the majority play no role nor do they have any impact in the situation here. Plaintiff's action against defendant is premised solely on an employer-employee relationship and a breach of the duty imposed by that relationship and not on any principal-agent status.

Assuming *arguendo*, as the majority did, that there existed a principal-agent relationship between P&LE and defendant, the impact of the agency principles pertaining to such relationship on plaintiff's case would be subject to the teaching of the Supreme Court that "Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job." *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 330 (1958). In *Sinkler* a railroad employee's injury was caused in whole or in part by the fault of an independent contractor performing operational activities of the carrier. It was never-

theless held that the independent contractor was an "agent" of the railroad within the meaning of the FELA.

In *Sinkler* the Supreme Court further said (p. 329):

"However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431, 438."

Finally, the majority's reversal of the District Court's denial of defendant's motion for judgment n.o.v. requires [fol.134] reference to the holding in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957) that:

"Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death."

For the reasons stated I would affirm.

* *Zegan v. Central Railroad of New Jersey*, 266 F.2d 101, 102 (3 Cir. 1959).

[fol. 135] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13755

MICHAEL SHENKER,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation,
and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Goodrich, Kalodner and Ganey, Circuit Judges.

JUDGMENT—April 11, 1962

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

April 11, 1962.

[fol. 136] Petition for rehearing covering 7 pages filed May 3, 1962 omitted from this print. It was denied, and nothing more by order June 1, 1962.

[fol. 137] {File endorsement omitted}

[fol. 137]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13,755

MICHAEL SHENKER,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation,
and THE PITTSBURGH & LAKE ERIE RAILROAD
COMPANY, a corporation

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Present: Biggs, Chief Judge, and Goodrich, Kalodner,
Staley, Ganey and Smith, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—June 1, 1962

After due consideration the petition for rehearing in the above-entitled case is hereby denied. Biggs, Chief Judge, and Kalodner, Staley and Smith, Circuit Judges, dissenting.

By the Court,

Goodrich, Circuit Judge.

Dated: June 1, 1962

[fol. 138] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 139]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1962

[Title omitted].

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—September 1, 1962

Upon Consideration of the application of counsel for petitioner,

It Is Ordered, that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14th, 1962.

Earl Warren, Chief Justice of the United States.

Dated this 1st day of September, 1962.

[fol. 140]

SUPREME COURT OF THE UNITED STATES

No. 414, October Term, 1962

MICHAEL SHENKER, Petitioner,

vs.


THE BALTIMORE AND OHIO RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—November 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

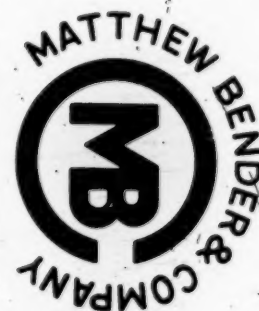
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MICRO CARD

TRADE MARK 

22

15942



63

